



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

Case Reference : **LON/00AR/LSC/2017/0178**

Property : **Flat 8, Charlotte Court, 68-79 Billet Lane, Hornchurch, Essex, RM11 1GD**

Applicant : **Christopher Michael Leader**

Representative : **In person**

Respondent : **Rivercraft Developments LLP**

Representative : **Mr Towers of Counsel**

Type of Application : **For the determination of the liability to pay service charges**

Tribunal Members : **Judge I Mohabir
Mr M Carins MCIEH**

Date and venue of Hearing : **25 September 2017
10 Alfred Place, London WC1E 7LR**

Date of Decision : **15 November 2017**

DECISION

Introduction

1. The facts of this case are largely a matter of common ground. The Applicant is the leaseholder of Flat 8, Charlotte Court, 68-79 Billet Lane, Hornchurch, Essex, RM11 1GD ("Charlotte Court") pursuant to a lease granted to him by the Respondent, as the freeholder, dated 15 December 2003 for a term of 125 years from 1 January 2003 ("the lease").
2. Charlotte Court consists of 15 flats. The Respondent is also the freehold owner of another development across the road known as Eleanor Court. It consists of 6 flats and was built after Charlotte Court.
3. It seems that since the completion of Eleanor Court, the Respondent has aggregated the building and estate charges for both properties and prepared service charge demands for the leaseholders on the basis of a 1/21 apportionment of the total costs. It is the Applicant's case that his service charge demands should have been prepared on the basis of a 1/15 apportionment of the costs only in respect of Charlotte Court alone.
4. There were earlier proceedings between the parties relating to service charges for the period September 2005 to July 2014. The Applicant in that case was the Respondent. Neither party attended the hearing. In its decision dated 15 December 2015, the Tribunal determined that any service charges demanded by the Respondent were "*not payable (by the Applicant) to the extent that have not been paid*" by him.
5. The Applicant subsequently issued proceedings in the County Court at Romford seeking a determination of whether his service charge liability included the costs of both properties and what the correct apportionment of the costs should be.
6. By an order dated 25 April 2017, District Judge Lewis transferred the proceedings to the Tribunal to determine the following specific issues:

- (a) the amount to be paid by the Applicant to the Respondent (if any) by way of service charge for the period 1 November 2011 to 30 April 2017 (part of which may or may not be covered by the previous Tribunal decision). The total amount of service charges claimed by the Respondent for these years is £8,942.40.
 - (b) whether the Respondent is entitled to include costs for Eleanor Court within the service charge calculations for Charlotte Court.
 - (c) the Applicant's apportionment of service charge, namely whether it should be 1/21 of the combined costs of Charlotte and Eleanor Courts, or 1/15 of the costs of Charlotte Court.
7. The Tribunal's determination is made under section 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act").¹

Lease Terms

8. Given that the issues before the Tribunal are ones of apportionment and contractual service charge liability, it is important to set out the relevant lease terms that apply to those issues in this case.
9. Clause 1.3 of the lease defines "The Building" as being the whole of the building erected on the estate.
10. Clause 1.8 defines the "Estate" by reference to the area edged red on plan 1 annexed to the lease. Materially, the plan makes no reference to Eleanor Court. The area edged in red only defines the boundary of the estate relating to Charlotte Court.
11. Clause 1.25 defines "the Premises" as being the Applicant's flat identified by reference to the area edged red on plan 3 annexed to the lease.

¹ see attached Appendix

12. Clause 1.30 defines “the Service Charge” as meaning the cost of providing the Services set out in the Third Schedule to the lease. These relate to the costs incurred or to be incurred by the landlord limited to the Building (as defined above), the car park, garden areas and ancillary services. Again and importantly, there is no express mention in the lease that these costs are to include and be aggregated with any similar costs in relation to Eleanor Court.
13. Clause 1.31 goes on to provide that the lessee’s contractual service charge liability is to be calculated as being “*one twenty-first of the charge for providing the services listed in the Third Schedule*” (our emphasis). Again, there is no express reference to Eleanor Court and any different basis on which the liability can be varied by the landlord subsequently to include service charge costs incurred in relation to that property other than due to “*a change of services*”.
14. The lessee’s covenant to pay the service charge can be found in clause 3.3 and when read with clause 1.30 appears to expressly limit the contractual liability to pay a service charge contribution only for the costs incurred in relation to Charlotte Court.

Hearing

15. The hearing in this matter took place on 25 September 2017. The Applicant appeared in person. The Respondent was represented by Mr Towers of Counsel. Prior to commencing the hearing, the Tribunal ruled that the Respondent could not admit further disclosure at that late stage on the basis that it had been legally represented throughout and had no good reason for not doing so before then. In addition, as the Applicant was a litigant in person, there was a real risk of prejudice to him by admitting the late disclosure in breach of the overriding objective.
16. At the conclusion of the hearing, the Tribunal issued supplementary directions requiring the Respondent to file and serve an apportionment

of the service charge expenditure claimed separately for Charlotte Court and Eleanor Court for the period November 2011 to April 2017.

17. What has been provided on behalf of the is an apportionment of the budget costs for the year ended 31 December 2016 together with balance sheets for the years 2007 to 2010. It seems that the current managing agents took over the management in 2016 and is only able to produce an apportionment for that year. As the current service charge year has not ended, the apportionment requested cannot be prepared.

Decision

18. In summary, the Applicant submitted that the express terms of the lease should be applied and that his service charge liability for the relevant years should be 1/21 for the costs incurred for Charlotte Court only and not Eleanor Court as well.
19. Mr Towers made three submissions regarding the construction of clause 1.31 and the reference to a one twenty-first service charge contribution.
20. Firstly, as a general point of construction, he submitted that the lease should give effect to what the parties had intended at the time the lease was entered into² so that with all of the relevant knowledge now which would have been reasonably available to the parties at the time, the Tribunal construe the lease so that it is consistent with business common sense.
21. Mr Towers went on to submit that the reference to a 1/21 service charge contribution in clause 1.31 meant that the parties must have intended the service charge costs for both properties should be aggregated simply because there are 21 flats in total.
22. The Tribunal did not accept that submission as being correct for the following reasons. As to ascertaining what the parties had intended and

² see *Arnold v Britton* [2015] UKSC 36

construing the lease accordingly, such an approach is only appropriate where there is ambiguity in a lease. The Tribunal was satisfied that no such ambiguity exists here. The lease had to be read as a whole.

23. At the time the lease was entered into, Eleanor Court had not been built. It was the Respondent's intention that the service charge cost for both properties should be aggregated, then one would have expected the lease to contain some express provision to this effect and, importantly, giving the landlord a discretion to vary scope of the service charge costs recoverable and the consequent contractual liability.
24. These provisions do not exist in this lease. Materially, the lease defines the Building and Estate as being Charlotte Court and not Eleanor Court. Indeed, the services to be provided in Schedule 3 of the lease relate only to Charlotte Court. The only conclusion to be drawn is it had been intended by the parties at the time that only the service charge costs incurred in relation to Charlotte Court were payable by the lessees. As to the mention of a 1/21 service charge contribution, this could only have been an error when the lease was drafted and certainly, for the time being, the Respondent is bound by this contractual term.
25. Secondly and alternatively, Mr Towers submitted that the Tribunal should imply into clause 1.31 that the services referred to in Third Schedule of the lease should apply to both properties and that this could be done in limited circumstances: see *Marks & Spencer plc v BNP Paribas Securities Services Trust Company* [2015] UKSC 72.
26. The Tribunal also did not accept this submission as being correct. It has already concluded that, save for the reference to a 1/21 contribution in clause 1.31, the other relevant lease terms are clear and unambiguous and the intention of the contracting parties was equally clear. To imply that the lease should also include the service charge costs of Eleanor Court would contradict the other terms of the lease, being one of the caveats set out Lord Neuberger in the *Marks & Spencer* judgement.

27. In addition, arguably, the Tribunal did not have jurisdiction under section 27A of the Act to imply terms into a lease. The jurisdiction is limited to a determination of a tenant's contractual liability to pay a service charge contribution and nothing else.
28. Thirdly, Mr Towers submitted it was open to the Tribunal to find that the Applicant's contractual liability is in fact 1/15 of the costs incurred in relation to Charlotte Court.
29. This submission also fails because it raises the same jurisdictional point set out above. It effectively asks the Tribunal to vary the express lease terms and it cannot do so in an application under section 27A of the Act. There was no application under section 35 of the landlord and Tenant Act 1987 to vary the lease before the Tribunal and, therefore, it had no jurisdiction to do so.
30. Finally, the Tribunal considered the relevant years for which service charge costs were recoverable by the Respondent at the contractual rate above.
31. For the period September 2005 to July 2014, the Tribunal was satisfied the earlier Tribunal had determined that no service charge costs were recoverable by the Respondent, save for those already paid by the Applicant. Therefore, any issue regarding the Applicant's contractual liability to pay any such costs was irrelevant.
32. As to the costs falling between August 2014 to April 2017, unless and until the Respondent is able to apportion those costs between Charlotte Court and Eleanor Court claimed for those years and to issue amended service charge demands, the Applicant has no liability at present to pay any such costs.

Section 20C

33. No application by the Applicant under section 20C of the Act was before the Tribunal. However, this does not preclude him from making such an application at a later stage if and when the Respondent seeks to recover any costs it may have incurred in these proceedings through the service charge account.

Judge I Mohabir
16 November 2017

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 27A

- (1) An application may be made to a leasehold valuation 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 a leasehold valuation 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.

Section 20C

- (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 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) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
 - (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
 - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
 - (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
 - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (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.

Leasehold Valuation Tribunals (Fees)(England) Regulations 2003

Regulation 9

- (1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.
- (2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).