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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case References	:	**BIR/00CS/LIS/2014/0057 and BIR/00CS/LIS/2014/0059**
Property	:	**Flats 6 and 10 Carver Court, Wake Green Road, Tipton, West Midlands, DY4 0AT**
Applicant	:	**Mr J Carver**
Representative	:	**Swaine Allen Solicitors**
First Respondents	:	**Mr J Salmon and Mrs M Salmon**
Second Respondent	:	**Mr G Moran**
Type of Application	:	**Under Sections 19 and 27A of the Landlord and Tenant Act 1985 and under Paragraph 5 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002**
Tribunal Members	:	**Judge S McClure** **D Satchwell FRICS**
Date and venue of hearing	:	**14 and 15th May 2015, Priory Court, Birmingham**
Date of decision	:	**9 July 2015**

DECISION

Decision of the tribunal

(1) The service charge demands were not made in accordance with the terms of the lease, and so were invalid demands. No service charge is payable in respect of an invalid demand.

(2) The administration charges claimed against Mr Moran were in respect of non-payment of service charges. As the relevant service charges demands have been found to be invalid, the associated administration charges are not payable.

The applications

1. The Applicant is the freeholder of Carver Court. Carver Court is a block comprised of 12 flats, 4 shops, and grounds.

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2. The First Respondents, Mr and Mrs Salmon, are the leaseholders of Flat 10 Carver Court. The Application regarding Flat 10 is in respect of non-payment of service charges of £3593.77 for the period 1 July 2008-30 June 2014. The Application was received by the Tribunal on 1 December 2014.

Case reference: BIR/00CS/LIS/2014/0059

3. The Second Respondent, Mr Moran, is the leaseholder of Flat 6 Carver Court. The Application regarding Flat 6 comprises an application in respect of non-payment of service charges of £1110.03 for the period 1 July 2012-30 June 2014, and an application in respect of non-payment of administration charges of £294. The Application was originally made to Northampton County Court and was transferred to the Tribunal on 3 December 2014.

Inspection and hearing

4. The inspection of Flat 10 and the common areas took place on 7 October 2014, in respect of in respect of an application by Mr and Mrs Salmon for an order for Appointment of a Manager. Present at the inspection were Mr Salmon. Representing Mr Carver were Mrs Canon-Leach, Solicitor, Mrs Pugh, Property Manager HLM, Mr Ward, Senior Property Manager HLM. The parties, in particular Mr Moran, agreed no further inspection was required in respect of the service charge applications.

5. The subject property is a purpose built block of 12 flats, with four shops at ground level, constructed of brickwork under a flat roof. To the rear are garages, let under the leases to the flats.

6. The hearing took place on 14 and 15 May 2015. Mr and Mrs Salmon attended, with Mr Salmon acting as main representative for them both. Mr Moran attended and represented himself. Mr Carver did not attend. He was represented by Miss Corfield of counsel. Also in attendance for Mr Carver were his father Mr A Carver, and his solicitor Ms Thompson.

7. By way of a letter dated 18 February 2015, Mr Salmon raised a preliminary issue in respect of the Flat 10 service charge case.

8. The parties in the Flat 10 application were notified by the Tribunal by way of a letter dated 25 March 2015 that, at the commencement of the 14/15 May 2015 hearing, the Tribunal intended to hear, and seek to determine, the preliminary issue raised by Mr Salmon.

9. The parties made oral and written submissions, which are mentioned specifically below where necessary.

The Preliminary Issue

The question to be answered

10. The preliminary issue to be determined by the Tribunal was as follows:

    (i) Were the service demands made during the period covered by the application[s], being from 2008 to date, valid service charge demands made in accordance with the terms of the lease?

Background to the preliminary issue

11. The Flat 10 lease provides that the leaseholders must pay a service charge of 1/12th of the service charge costs. In fact, because the block consists of 16 units, 12 flats and 4 shops, the leaseholders were charged 1/16th of the service charge costs. Mr Salmon claimed that as the lease provided for 1/12th and he was charged 1/16th, the service charge demands were not in accordance with the lease and so were invalid. The Flat 6 lease is identical to the Flat 10 lease in all material respects.

12. At first glance it might seem odd that a leaseholder would object to paying a service charge that was for a lower sum than that which the lease allowed the freeholder to charge. However, it appears that Mr Salmon is objecting to the 1/16th demand because, inter alia, by his calculation the correct service charge payable for each flat is less than 1/16th, so even the 1/16th demand is too high. Whatever his reason for

doing so, Mr Salmon raised a valid objection to the service charge demand and one which the Tribunal must consider.

13. It is an established principle of the law relating to service charges that a service charge demand must be made in accordance with the terms of the lease. The Applicant did not seek to challenge that principle. The Applicant argued that the service charge demands were valid demands in accordance with the terms of the lease. The Applicant's arguments are set out and discussed below.

The Lease

14. The lease under which Flat 10 is held ('the Lease') is dated 8th June 1976 and is for a term of 99 years from 25th March 1974. The provisions of the Lease relevant to the Applications are set out at paragraphs 15-20 below.

15. Part II, paragraph 2(i) [the Lessee covenants] To contribute and pay one equal 1/12th part of the costs and expenses outgoings and matters mentioned in the First Part of the Eighth Schedule hereto and one equal 1/12th part of those mentioned in the Second Part of the said Eighth Schedule...

16. Part I of the Eighth Schedule EXPENSES OF THE BUILDING moneys expended or reserved for periodical expenditure by or on behalf of the Lessor ... hereby granted upon (1). Maintaining repairing redecorating and renewing:-

> (a) the main structure roof gutters and rainwater pipes of the Building and garage (if any)
> (b) the entrances passages landings and staircases in common with all other persons having a like right
> (c) the water pipes drains and electric cables and wires in or under the Building ...
> (d) the television aerial in and serving the Building

17. There are further references in Part I of the Eighth Schedule with regard to the Building in respect of: lighting common parts, decorating the exterior, insurance and payment in respect of audited accounts.

18. Part II of the Eighth Schedule EXPENSES OF THE MANSION moneys expended or reserved for periodical expenditure by or on behalf of the Lessor...upon...

> (1) (rates etc payable on the Mansion)
> (2) Trimming and cutting of lawns borders hedges and general horticultural matters relating to the garden plants hedges and trees growing therein

(3) Maintaining and repairing the paths driveways and garage forecourt
(4) (charges etc for nuisance regarding the Mansion)
(5) The costs charges and remuneration of the Lessor and any Agent or Agents employed by the Lessor to manage or administer the Mansion

19. The Mansion is defined in the First Schedule as: ALL THAT land at Wake Green Road, Tipton together with the building flats garages driveways pathways gardens and grounds thereof shown for the purpose of identification only on the plan and thereon edged green.

20. The Flat is defined in the Second Schedule as: ALL THAT First floor flat known as Flat number 10, Wake Green Road, Tipton aforesaid shown for the purpose of identification only on the plan and thereon coloured brown and situated in the block of flats (hereinafter called "the Building") which is shown for the purpose of identification only edged red on the plan....

Matters not in dispute

21. The following matters were not disputed by either party:

(i) "The Building" is the block of flats within which Flats 1-12 are contained.

(ii) It is not clear what "the building" (lower case 'b') refers to. It appears to be something different to "The Building".

(iii) "The Mansion" includes the whole of the grounds surrounding the flats and the shops.

(iv) The Lease provides that each Leaseholder of the 12 flats must pay 1/12th of all of the expenses of The Building.

(v) The Lease provides that each Leaseholder of the 12 flats must pay 1/12th of all of the expenses of the Mansion.

(vi) The expenses of the Mansion, as set out at Part II of the Eighth Schedule, do not provide for the repair, improvement, etc of any buildings.

(vii) The Respondents have been charged 1/16th and not 1/12th for the relevant years. Mr Salmon stated that the charge had been 1/16th since Mrs Salmon purchased the lease in 1998. The Applicant agreed the 1/16th had been charged for many years, and did not dispute Mr Salmon's assertion as to 1998.

" The Building"

22. "The Building" is defined in the Lease as 'the block of flats' within which the flat is situated. There is a question as to whether the block of flats and, therefore, "The Building" includes the shops as well as the flats. This question is important because the Lease provides for the Leaseholders of the flats to pay, between them, 100% of the expenses of "The Building". If "The Building" is found to include the shops, the Leaseholders of the flats will be liable to pay the expenses of the shops as well as the expenses of the flats.

23. It is accepted that the block itself contains the flats and the four shops. The block is fairly standard, with the four shops in a row at ground level, and the 12 flats situated above and to the sides of the shops.

24. Miss Corfield contended that the term 'the block of flats' means the flats and the shops. She referred the Tribunal to the standard principles of contractual interpretation. She summarised those principles accurately. They are discussed below as appropriate.

25. Miss Corfield cited the 'reasonable reader' rule of statutory interpretation, which provides that, looking at the lease as a whole, one must consider what a reasonable person would understand the parties to have meant. Miss Corfield contended that a reasonable reader of the lease would read the phrase 'the block of flats' to mean the whole structure, and the whole structure includes the shops. The most reasonable reading of the Lease, Miss Corfield contended, is that the 'block of flats' includes the shops; therefore "The Building" includes the shops.

26. Miss Corfield accepted that this result is one which could be said to be unfair, in that the leaseholders of the 12 flats are obliged to pay the expenses of the shops in addition to the expenses of the flats. However, she contended, the fact that a term of a lease is unfair does not make that term invalid.

27. The Tribunal does not accept that the term 'block of flats' refers to the flats and the shops. The Tribunal finds that the term 'block of flats' refers only to the 12 flats. The Tribunal finds it more likely than not that if those who drafted the Lease had intended the reference to the block to include the shops, they would have referred to the 'block of flats and shops'. The plan attached to the Lease is blank in the space where the shops are situated, whereas all 12 flats are individually numbered, supporting the view that the shops were not intended to be the responsibility of the leaseholders of the flats. When interpreting a lease one must take into account background information that would be reasonably be known to the parties of the lease. It would be reasonable for the parties to this lease to know that the block comprised flats and shops. A reasonable reading of the Lease, in fact the most reasonable

reading, is that the reference to the flats alone in the phrase 'block of flats' was deliberate, and was so as to exclude the shops from the terms of the Lease relating to the 'block of flats' and, therefore, to "The Building".

28. Further, applying the principle that where there is ambiguity in a lease, the Tribunal must seek to achieve the most commercially sensible result which the words are capable of bearing, the Tribunal finds that the most commercially sensible result is that the leaseholders to the flats would not be expected to pay the expense of the shops.

29. The Tribunal finds that the leaseholders of the flats are liable to pay all of the expenses of the flats, at 1/12th each, and are not liable to pay any of the expenses of the shops.

"The Mansion"

30. The Tribunal finds, and this is not disputed by the parties, that the leaseholders of the flats are liable to pay the whole of the expenses of the Mansion. The term "the Mansion" is clearly defined. There is no ambiguity. It could be said to give rise to an unfair result, in that the leaseholders of the flats are obliged to pay for all of the expenses relating to, inter alia, the maintenance and upkeep of the grounds, from which the shops undoubtedly benefit. However, as Miss Corfield argued and as accepted by the Tribunal, an unfair outcome does not, of itself, render the relevant term invalid.

31. The Tribunal finds, and this is not disputed by the Respondents nor strongly argued to the contrary by Miss Corfield, that "The Mansion" does not include the shops. There is some ambiguity in the Lease on this point. The only part of the definition of "The Mansion" that could conceivably be read to mean shops is the word 'building', within the phrase 'building flats garages driveways gardens and grounds thereof...'. The Tribunal finds that a natural reading of the word building, in the context of the Lease, does not lead one to read 'shops' for 'building'. The shops are an integral part of the structure of the block that contains the shops and the flats, and it would be a very unusual reading to find that the four shops would be described as a building. The Tribunal finds that on an ordinary reading of the Lease, "The Mansion" does not include the shops.

32. In any event, the expenses of "The Mansion", as set out at Part II of the Eighth Schedule, do not provide for the repair, improvement, etc of any buildings. Therefore, even if the Tribunal had found that "The Mansion" did include the shops, there is no liability within the Lease for the leaseholders of the flats to pay any of the expenses of maintenance, repair, etc of the shops.

The service charge demands.

33. Miss Corfield contended that the service charge demands are valid because the requirement to pay 1/12th is a requirement to pay *up to* a 1/12th. Therefore, a demand to pay 1/16th is a valid demand.

34. Miss Corfield submitted that there is no precedent authority which holds that a service charge demand that is for less than is required by the lease is not a valid service charge demand. Miss Corfield conceded that there is no authority to support her client's position that a demand for less than the sum authorised by the lease is a valid demand, but contended that this was likely to be because a leaseholder was unlikely to challenge a service charge demand that was for less than the sum the Freeholder could charge. Miss Corfield submitted that this situation was analogous to that where a claim for payment on account was made, with the lessee having no grounds to object if the final costs were less than the sum claimed on account. In summary, Miss Corfield submitted that a demand for a sum for less than that allowed by the Lease was a valid demand.

35. The Tribunal acknowledges there is some logic to Miss Corfield's argument; however the Tribunal must interpret the Lease in accordance with the rules on contractual interpretation. These include the obligation to give the words in the lease their ordinary meaning and not to imply words where the meaning is clear. The clause is clear. There is no ambiguity. The Lease provides for payment *of* 1/12th of the expenses, and not for payment *up to* 1/12th. For this reason, the service charge demands for 1/16th of the service charge are invalid.

Correction of the Lease by construction - mistake

36. Miss Corfield submitted that, in the alternative, the Tribunal should find that the Lease should be construed so that 1/12th is read as 1/16th. The Tribunal accepts that if the Lease is construed in that way, then the service charge demands for 1/16th are valid service charge demands, insofar as they are made in accordance with the Lease.

37. Miss Corfield submitted that if the Tribunal finds that "The Building" comprises just the flats and not the shops, then it is open to the Tribunal to find that the Lease contains a clear mistake, correctly referring the Tribunal again to the standard principles of contractual interpretation. Miss Corfield submitted that it was open to the Tribunal to find that the proportion of 1/12th is wrong.

38. She further contended that if the Tribunal makes such a finding, then a correction can only be made if there is a clear correction. She submitted that there is a clear correction, which is that the correct proportion should be 1/16th, on the basis that there are 16 units. She argued that a

square footage calculation of expenses was wrong, because the 1/12th proportion existing in the Lease is not a square footage proportion. The only clear correction is to apply the method of calculating the service charge already contained within the Lease, which is a 'per unit' proportion - a 1/16th. On that basis, the service charge demands for 1/16th are valid demands.

39. Mr Salmon argued that whilst 1/12th is clearly wrong, 1/16th is also wrong. He argued that the service charge should be calculated on a square footage basis and, on that basis, the leaseholders of the flats would be liable for less than 1/16th. He argued that the shops are bigger than the flats and, therefore, a square footage proportion is fairer.

40. The Tribunal considered whether there was a clear mistake within the Lease and, if there was, whether that mistake had a clear correction. The Tribunal found that, on balance, there is a clear mistake in the Lease. The balance of the evidence overall was that, so far as the Tribunal could ascertain, the intention of the parties to the lease was that the leaseholders to the flats would pay the expenses of the flats and a reasonable proportion of the expenses of the common parts, such common parts referred to in the Lease as "The Mansion", with the shops bearing the expenses relating to the shops and a reasonable proportion of the expenses of "The Mansion".

41. However, the Tribunal did not find that there was a clear correction. There was force to the submissions of both parties, so that no single correction was compelling. Because the Tribunal did not find a clear correction, the Tribunal could not read the Lease so that 1/12th is read as 1/16th. Accordingly, the service charge demands are invalid.

Flat 6

42. The Lease for Flat 6 is identical in all material respects to the Lease for Flat 10.

43. The Applicant stated that if the Tribunal found against him with regard to Flat 10 he would concede the point with regard to Flat 6.

Deliberations of the Tribunal

44. The Tribunal adjourned the hearing at noon, and reconvened at 1.30pm. The Tribunal then told the parties of its decision on the preliminary matter. As the decision disposed of both of the Service Charge applications, those applications concluded. The Tribunal then commenced the hearing of the section 24 Appointment of Manager application, which involved the same parties and the same property. That decision is also issued today, case reference BIR/00CS/LAM/2014/0002.

Decision of the Tribunal

45. The First Respondent is liable to pay 1/12th of the expenses of the flats and 1/12th of the expenses of "The Mansion". The Second Respondent is liable to pay 1/12th of the expenses of the flats and 1/12th of the expenses of "The Mansion". There is no liability to pay the expenses of the shops. There is no liability under the Flat 6 or Flat 10 Leases for the shops to pay any expenses of "The Mansion".

46. The service charge demands for the period 1 July 2008-30 June 2014 in respect of the First Defendant and 1 July 2012-30 June 2014 in respect of the Second Defendant are not valid, as they were not demanded in accordance with the terms of the Lease.

47. No service charge is payable by the First Respondent for the service charge years 1 July 2008-30 June 2014 in respect of any service charge demand that has been found by the Tribunal to be an invalid service charge demand.

48. No service charge is payable by the Second Respondent for the service charge years 1 July 2012-30 June 2014 in respect of any service charge demand that has been found by the Tribunal to be an invalid service charge demand.

49. The Administration Charges claimed against the Second Respondent of 6 September 2012 - £144, and 27 September 2012 - £150 are not payable.

Comments

50. It is not clear from the Lease, nor from the submissions of the parties, how the expenses of the flats and the shops are to be identified. For example, whilst it is likely that expenses relating to the Canopy are solely an expense of the shops, there may be arguments the Applicant or the leaseholders of the shops would like to advance, that the flats should bear some of those costs. For this reason, the Tribunal is not able to specify exactly which expenses are attributable between the flats and the shops. Indeed, the Tribunal was not asked by either party to undertake this task.

51. It seems to the Tribunal that its findings leave the parties in an unsatisfactory situation. It appears that the Applicant and the Respondents wish for the Respondents to bear the costs of the flats and to share the costs of "The Mansion" with the shops, and for the leaseholders of the shops to bear the costs of the shops. However, this is not something the Tribunal can resolve in this application, and it will be for the parties to decide how they deal with this issue hereafter.

52. The Respondents had several further submissions to make with regard to alleged defects with the service charges, but as the preliminary issue found in their favour, no further matters needed to be considered by the Tribunal.

53. It is noted that the Applicant did not seek to pursue his claim against the First Respondents in respect of the service charge year 2008/9, on the basis that it was out of time.

Application under S20C

54. The Applicant has confirmed that he would not seek to recover his costs of these proceedings from the Respondents, through the service charge. The Tribunal therefore grants the section 20C Application and orders that no part of the Applicant's costs incurred in connection with the proceedings before the Tribunal are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondents.

55. In reaching their determination the Tribunal has had regard to the evidence and submissions of the parties, the relevant law and their own knowledge and experience as an expert Tribunal but not any special or secret knowledge.

56. If either party is dissatisfied with this decision they may apply for permission to appeal to the Upper Tribunal (Lands Chamber). Prior to making such an appeal, an application must be made, in writing, to this Tribunal for permission to appeal. Any such application must be made within 28 days of the issue of this decision which is given below (regulation 52 (2) of The Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rule 2013) stating the grounds upon which it is intended to rely on in the appeal.

Name: Judge S McClure

Date: 9 July 2015