



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

Case Reference : LON/00AC/LSC/2014/0528

Property : Apartments 1502 and 1508, 100 Kingsway,
North Finchley, London N12 0EN

Applicant :
1. Nicola Mackulin
2. Anthony McMahon

Respondent : Tally Ho Investments Limited

Representative : Parkgate Aspen Property Management

Type of Application : An application for determination as to the
reasonableness and payability of service
charges

Tribunal Members : Judge Shaw
Mr M. Cairns MCIEH
Mr C. Piarroux JP CQSW

Date of hearing : 11 and 12th March 2015

Venue of Hearing : 10 Alfred Place, London WC1E 7LR

Date of Decision : 24 April 2015

DECISION

Introduction

1. This case involves an application made by Nicola Mackulin and Anthony McMahon (“the Applicants”) in respect of the apartments numbered 1502 and 1508, 100 Kingsway, North Finchley, N12 0EN (“the Property”). The Applicants were at all material times the leasehold owners of the property although one of the apartments has now been sold. The application is made against Tally Ho Investments Limited (“the Respondent”) which company is the immediate landlord of the Applicants. The nature of the application is for a determination of the reasonableness and payability of service charges levied against the Applicants by the Respondent in respect of the two apartments, and in particular charges referable to the car parking spaces attributed to each of the apartments.
2. A case management conference took place on 6th November 2014, consequent upon which, directions were given by the Tribunal. Both parties have complied with those directions and as a result, more than 450 pages worth of documentation has been generated in this case, contained in a main bundle prepared by the Applicants and a further smaller bundle prepared on behalf of the Respondent. The Applicants represented themselves at the hearing which took place on the 11th and 12th March 2015. The Respondent was represented by its managing agents, namely Parkgate Aspen Property Management Limited and in particular Mr S. Unsdorfer, a Director of the management company.

Inspection

3. The members of the Tribunal inspected the property during the morning of the first day of the hearing. The apartments are situated in a large mixed use development with commercial units and well appointed apartments above. The inspection was helpful in that the Tribunal was able to view the car parking arrangements below ground level, which parking area is used both by leaseholders of the various apartments and other commercial users associated with the shops and stores on the ground floor. The block generally appeared to be well equipped and maintained, and the car park area in particular seemed to be cleaned and maintained to a very high calibre, together with 24 hour security provision.

The Issues

4. The issues arising in this case were identified by the Tribunal at paragraph 8 of the Directions given on 6th November 2014, following the Case Management Conference, which was attended by both parties. Those issues have been used as the basis for certain opening submissions prepared by counsel on behalf of the Respondent and which were supplied at the hearing. The issues as identified in those written oral submissions were perused by the Applicants and with the agreement of all parties, the Tribunal structured the hearing in accordance with those

issues and heard submissions from both sides upon the matters therein raised.

5. The main issue in this case is whether or not the Applicants are required to pay, as part of their service charge, sums referable to their occupation and the maintenance of the car parking spaces allocated to the two apartments which are the subject matter property of this application. The Applicants' contentions are that they are not so liable, and the Respondent contends that there is such liability arising under the terms of their leases. The other issues relate to whether or not the sums charged are themselves reasonable and apportioned in a rational and proper way, in accordance with the leases, and there are also issues about certain balancing charges which have been added to the Applicants' accounts to which reference will be made.
6. Further, there are some additional issues relating to the validity of certain demands, liability for legal fees, and a question as to whether or not an estoppel has been created against the Respondent and in favour of the Applicants, in respect of the claiming of certain historic arrears. It is proposed to go through these issues in turn, to analyse them so far as is possible, by reference to the parties' respective submissions, and to give the Tribunal's finding in respect of each such issue.

Are the Applicants obliged to pay service charges referable to their car park spaces?

7. The Applicants' contention in this regard is that they were surprised to receive in their demands for payment of service charge and in the service charge accounts, notice of the fact that they were being charged a levy within their service charges for the use of the car park spaces allocated respectively to these apartments. Their case was that they had sought advice from various sources as to whether or not a liability existed under their lease to make such payment, and that they had consistently been advised that there was no such liability. These apartments were purchased by them at auction and, as indicated, they had no expectation that a sum would be charged in respect of the car parking spaces. Further, as indicated above, the Applicants acted in person before the Tribunal and reasserted, although the argument was not developed in any detailed way by reference to the lease obligations, that they were not required to make such payments under the terms of their leases.
8. On behalf of the Respondent, the Tribunal was taken through the relevant contractual obligations as appearing both in the Applicants' leases and the superior lease to which reference is made in those leases. The Applicants' leases appear at pages 1 to 56 in respect of the apartment at 1502 and 57 to 113 in respect of the apartment at flat 1508. To all intents and purposes these leases contain identical provisions.
9. Dealing with, for illustrative purposes, the lease to apartment to 1502 (which appears at pages 1 to 56 in the bundle) at paragraph 5 of Schedule 2 to the lease, the right to use a car park space or spaces is granted. The

proprietary chain of title in this case is that the London Borough of Barnet owns the freehold of the development. It granted a head lease to Tally Ho One Limited and Tally Ho Two Limited. Tally Ho One Limited and Tally Ho Two Limited granted a building lease to the company Wilson Connolly Limited. Wilson Connolly Limited, after completion of the development was bought out by the Respondent company which effectively took an assignment of its lease. From that lease have been carved out the various sub-underleases of the apartments, of which the Applicants are two such sub-underlease owners. The Applicants' sub-underleases are governed by a further superior lease which appears at pages 170 to 218 in the bundle.

10. Reverting to the Applicants' sub-underleases (which will be referred to as "leases") the obligation to pay the service charge is explained at Schedule 9 to their leases which for illustrative purposes appears in relation to the first apartment at page 26 and 27 of the bundle. At paragraphs 1.10 to 1.13 of Schedule 9 to the leases, express reference is made to "service charge" which is defined as being "*for any charging period the superior lease charge and the residential charge*". At 1.12: "*Superior lease charge*" means "*the percentage of the superior lease service charge in any charging period*" and at paragraph 1.13 "*Superior lease service charge*" for any charging period means "*the service charge payable by the landlord pursuant to the superior lease*".
11. Under Schedule 8 to the superior lease dated 22 December 2003 referred to above (see page 215 of the bundle) car park charges are part of the superior lease service charge as defined in the Applicants' sub-underleases. Particular reference to these charges can be found at page 202 in the bundle where at Schedule 8 to the superior lease, Part 1, paragraphs 1.5 and 1.6, can be found the reference to the car park costs.
12. By virtue of Schedule 7 to the Applicants' sub-underleases, there are tenants covenants with the superior landlord and the landlord and other owners permanently. At paragraph 4 of Part 1 of Schedule 7 the Applicants undertake "*To observe and perform the covenants on its part contained in Schedule 9*" (the heading of paragraph 4 is "*service charge*"). Schedule 9 as already observed deals with the service charge and defines the service charge by reference to the superior lease charge in the superior lease.
13. Again as already observed, the Respondent, as the Applicants' immediate landlord, is itself charged car park charges as part of the superior lease service charge under Schedule 8 of the superior lease – see pages 202 and 215. By this route, it seems to the Tribunal that the Applicants are indeed liable to pay charges in respect of the reserved parking places because they undertake in their own leases, in the provisions already referred to, to pay a service charge which is defined by reference to the charge levied under the superior lease.
14. As observed in the Respondent's opening submissions, not only is this provided for in their sub-underleases but it accords with common sense.

The maintenance and provision of these car park spaces, and in particular the 24 hour surveillance provided does not come without cost and it would be surprising if such facilities were provided gratuitously.

15. For the reasons indicated above and by reference to the contractual provisions set out in the Applicants' underleases and the superior lease, the Tribunal finds that there is indeed an obligation on the part of the Applicants to make payments through their service charges for the upkeep and provision of the car park spaces attributed to the property.

Are the sums claimed reasonable?

16. The costs in respect of the car park facilities are set out in detail in the annual accounts which are supplied in full in the bundle prepared by the Applicants. That service charge expenditure can be found for example in relation to the service charge year ending 31st December 2011 at page 343 in the bundle. There was no evidence put before the Tribunal by the Applicants to suggest that these figures, which have been audited and certified by a chartered accountant, are in some way excessive. Having viewed the facilities supplied, the Tribunal does not find the charges therein contained anything other than reasonable on the information available to it.
17. So far as the apportionment of the cost is concerned, as will be observed from the calculations, an example of which can be found at page 251, the percentage applied to the overall cost is .7576%. This is the percentage equivalent of $\frac{1}{131}$. There are 131 parking spaces and thus the cost has been apportioned in an entirely proportionate way. Again, there is no evidence from the Applicants to suggest that this is inappropriate in some way, and the Tribunal considers that the apportionment is rational and reasonable in all the circumstances.
18. Accordingly, the Tribunal is satisfied on the evidence before it that the charges made for the car park spaces in the context of the service charge are reasonable, both in terms of their quantum and the manner of calculation.

Inclusion of balancing charges in the Applicants' accounts

19. Included within the service charge account running balance leading to the arrears which have built up on the Applicants' accounts are certain figures referable to the service charges 2006 and 2007, in other words the two years prior to the purchase by the Applicants of their respective apartments. They contend that since these arrears (the balances of which, after crediting charges, appear relatively modest - see below) accrued prior to the date of their purchase, they should not be liable for them. In particular they contend that when the purchase of Flat 1508 occurred at auction, an enquiry was made of the Respondent as to any outstanding balance from the previous owner and the information supplied by a lady called Reena by email was to the effect that at that

time there was no such outstanding balance. They also argue that even if these sums were due, they have not been the subject of any Section 20B compliant demands which bite against the Applicants because they would not have received those demands for the obvious reasons that they were not the owners of the apartments at the time that sums fell due.

20. They further argued that the failure to disclose the accrued liability at that time, would amount to an estoppel in respect of the Respondent recovering such sums subsequently.
21. So far as Apart 1502 is concerned (which was not purchased at auction) again the Applicants rely on a letter from Philip Cove of the Respondent's agents dated 25th January 2010 and included in the bundle which confirmed that at that date there was no outstanding balance due and that therefore the addition of balancing charges thereafter ought not to be permitted.
22. Dealing with these arguments in turn, first, it is correct that the Landlord and Tenant (Covenants) Act 1995, generally releases assignees of leases of liability for breaches of covenant preceding the assignment. This however is in respect of liabilities which have crystallised and fallen due prior to the date of the assignment. While the expenditure itself may have been incurred prior to the assignment, the obligation to pay a deficit charge (occurring when a budget has been exceeded) often does not arise until the accounts have been finalised. This means that an assignee may have a liability for service charges that relate to expenditure incurred prior to the assignment, despite the fact the charge were incurred prior to the date of assignment.
23. This is why it is generally good practice for purchasers or their solicitors to make full enquiry as to charges which may have been incurred prior to the date of assignment, but which will not become payable until sometime following the purchase date. Often this protection is afforded to the purchaser by full and standard "tariff" enquiries, and the keeping back of a retention from the purchase price, until all potential balancing charges arising on the finalising of the service charge accounts have been ascertained.
24. In this case, these usual enquiries, on the evidence before the Tribunal appear not to have been completed. The Applicants put before the Tribunal on the second day of the hearing, some documents evidencing what appeared to have happened. In respect of Apartment 1508 (there was no documentation in respect of the other apartment), which was purchased at auction, a leasehold enquiry form was sent out on behalf of the Applicants, and on 20th and 21st July 2007, this was responded to on behalf of the Respondent with a request that various costs for supplying this information be forwarded, upon receipt of which the answers would be supplied.
25. There is however no evidence in the papers submitted that those costs were ever met, nor the enquiries completed. Whether or not this was because the purchase was made quickly at auction, would be speculation

- but on the evidence before the Tribunal, the usual package of information which may have given particulars of outstanding financial years in respect of which accounts had not at that date been finalised, appear not to have been obtained.

26. The evidence from the Respondent (see its Reply at page 40 in the bundle) is that the balancing charges about which the Applicants are concerned, had not fallen due at the date of the assignment, because the relevant accounts for the years concerned had not at the dates of purchase been finalised. The Tribunal was told that the reason for this was a lengthy dispute with the developers about certain costs. Be that as it may, the balancing charge, which was small, was subsumed by credits for 2006 and 2007 totalling £826.64 for each apartment - which credits were applied in favour of the Applicants in 2011 - as is evidenced by the running account 228 in the bundle.
27. The Tribunal found this evidence cogent and compelling, and for the reasons indicated above is satisfied that the balancing charges were in fact payable by the Applicants, for the reasons indicated above, subject to the section 20B notices and estoppel points, with which the Tribunal will now deal.
28. The relevant section 20B notices are all in the bundle and the page references are given at paragraph 20 of the Respondent's written opening submissions. The Tribunal accepts and adopts the explanatory observations made about those notices at paragraphs 21-23 of the submissions (to the effect, amongst other matters, that the notices are not required to be precise about the sums outstanding). The Applicants point that they would not have received notices served on their predecessors, is of course right, but does not seem to the Tribunal to be an invalidating factor. The notices would have been disclosed in ordinary enquiries before contract in the usual way, had such enquiries been completed. The Tribunal is satisfied that 20B has been complied with on behalf of the Respondent in respect of these charges.
29. The Tribunal does not consider that an estoppel arises in respect of these charges in this case. The representations made both Reena Mevani and Mr Cove on behalf of the Respondent, were both responses to enquiries as to whether there were outstanding charges on the respective accounts. The answers they gave were accurate at the time they gave them in respect of the account when then viewed, because the balancing charges which subsequently fell due for payment had not at that time become payable. They were not asked for the detailed and specific information itemised in standard leasehold enquiries, and were certainly not giving any kind of undertaking that subsequent balancing charges would not fall due - nor were they asked that question. Indeed, letters were regularly sent out to leaseholders (see page number and quotation at paragraph 25 of the Respondent's submissions) putting them on notice of potential balancing debits or credits upon completion of the delayed accounts.

30. A claim for Legal Fees was abandoned by the Respondent at the hearing, as was a possible claim by the Applicants, of poor management. No finding is therefore made by the Tribunal on these matters.

COSTS

31. Both parties made applications against the other for an order for costs against the other party based on alleged unreasonable conduct of the proceedings. The Applicants also sought a section 20C order in respect of costs.
32. The unreasonableness alleged was that each party asserted that it had extended offers to mediate this case, which had either been rejected or not responded to, by the other side. There was some evidence to support both sides in this regard, and the parties' communications with each other appeared to the Tribunal to be unsatisfactory to some degree, in that miscommunication which might have been followed up upon, or clarified, did not take place. The Tribunal does not consider this an appropriate case for a costs order on either side.
33. Equally, the Tribunal cannot see that there is any particular reason for granting a Section 20C Order in this case. The Tribunal has found that in the main these service charges are indeed recoverable against the Applicants and that the principal issue, that is to say the question of liability for payments in respect of the car park spaces is made out by the Respondent. Accordingly no Section 20C Order is made either.

Conclusion

34. For the reasons indicated above, the Tribunal is satisfied upon proper construction of the sub-underleases and superior lease in this case that a liability to pay service charges referable to the respective car parking spaces does exist in this case and that this issue is decided in favour of the Respondent. The charges levied are found by the Tribunal to be reasonable both in terms of quantum and calculation. The balancing charges are, for the reasons indicated above, found by the Tribunal to be recoverable by the Respondent against the Applicants and the Tribunal rejects the contention that any estoppel is made out as a matter of law in this case.
35. For the reasons indicated above, the Section 20B Notices which have been fully exhibited in the case on behalf of the Respondent are found by the Tribunal to be effective. The parties claims for costs against each other are rejected on both sides and no Section 20C Order is made. It follows from these findings that the service charges levied by the Respondent against the Applicants are recoverable in full, save for the deduction of the £541.88 referable to legal fees, which should be deducted from the account.

JUDGE SHAW
24th April 2015