First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/00KB/LSC/2017/0043**
Property	:	**Flat 99 St. Bedes, 14 Conduit Road, Bedford, MK40 1FD**
Applicant	:	**Jeanne Tompkins**
Respondent	:	**Orbit Group Ltd.**
Date of Application	:	**24th March 2017**
Type of Application	:	**to determine reasonableness and payability of service charges**
The Tribunal	:	**Bruce Edgington (Lawyer Chair)** **David Brown FRICS**

DECISION

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1. The Tribunal determines that the service charges claimed for the provision of staff at night are within the provisions of the lease and, in the absence of a challenge to the amounts involved, they are payable.

2. No order is made pursuant to section 20C of the **Landlord and Tenant Act 1985** ("the 1985 Act") preventing the Respondent from recovering its costs of representation as part of a future service charge.

Reasons

Introduction

3. The property is a flat in a relatively new development of 104 one and two bedroom flats for people aged 55 or over who are, for some extraordinary reason, defined as 'elderly' in the lease. 53 are subject to long leases and 51 are let on assured tenancies.

4. The application says that a number of the other long leaseholders are 'Applicants'. However, only Mrs. Tomkins signed the application form. As parties to any application can be ordered to pay costs, it is clearly unacceptable to just include people as applicants when they have neither signed the application nor committed themselves to a statement of truth. However, the issue raised is of general importance and no doubt this decision will be considered accordingly.

5. It is noted that a David Brown from flat 30 has signed a statement of evidence. It should be noted that this witness has no known connection with the member of this Tribunal with the same name.

6. The application asks the Tribunal to determine whether the long leaseholders are bound to pay something over £700 per annum (the precise figure is in dispute but forms no part of this application) for a service provided by the landlord Respondent i.e. the provision of 2 members of staff who provide emergency care at the development between the hours of 10.00 pm and 7.00 am each night. There are in fact 3 members of staff but the 3rd is paid for by the local authority.

7. The Tribunal is told that there are emergency alarms in each flat and there were 242 emergency calls for the 10 or 11 months after 1st April 2016. It is said on behalf of the Applicant that the emergency alarms are not in the lounges or bedrooms where people spend most of their time and that some of the emergency calls may have been false alarms e.g. people using the alarm when they thought they were turning a light on.

8. The bundle consists of some 178 pages which the Tribunal members have considered carefully. Much has been said about the need for this service, its use and whether residents want it. However, at the end of the day, the Tribunal is only concerned about payability i.e. what is the agreement between the parties and what is the law?

The Lease

9. The bundle produced includes a blank copy of the lease which is for a term of 125 years from 1st January 2012 with an annual ground rent which is subject to change over the term. The lease provides that the landlord shall insure the property and keep the building and grounds in repair. It can then recover one, one hundred and fourth of the cost of so doing from the leaseholder.

10. It is unfortunate that a lease designed for people approaching retirement or having retired should be 53 pages long. It is also unfortunate that the provisions dealing with the disputed care service should be confusing and vague.

11. The Respondent says that the staff costs in question are collected as part of the 'Wellbeing Charge'. However, such cost is defined on page 46 of the lease (page 88 in the bundle) as being the cost "*to provide activities of the scheme for the benefit of the Leaseholder and those other residents of the scheme*". Whether the disputed care charge comes within this definition is certainly open to question. Regrettably, the 'scheme' is not defined in either the definition section of the lease at the beginning or in Schedule 11.

12. The witness David Browns says that there used to be an 'activities organiser' employed by the landlord which, if true, may be what this definition relates to. It is also noted that the Respondent's 'frequently asked questions' leaflet at page 112 in the bundle mentions an activity co-ordinator 'to provide a range of activities on the scheme'.

13. The other way in which the Respondent says that it claims the charge is pursuant to clause 7.4.7 on page 65 in the bundle. Clause 7 defines the service charge provisions and states that the landlord can charge for "*...all other reasonable and proper expenses (if any) incurred by the landlord..... that the Landlord in its absolute discretion thinks will be of benefit to the Estate and the Leaseholders and other occupiers of the Estate...*". It is certainly one of the covenants of the landlord that it must "*arrange for the answering of emergency calls*" (clause5.6.1(b)). Clause 7.1 is the leaseholders covenant to pay for the service charges, subject to such charges being reasonable.

14. There are other provisions which could apply. Clause 3.32 refers to support and says that if " *a Leaseholder has been assessed and required to enter into a Care Contract the Care Contract shall be fundamental to the Leaseholder's occupation of the Premises*". However, there is no suggestion that this clause is relied upon, despite the terms of clause 5.6.3 which says "*At the time the Lease is entered into the Leaseholder will also enter into a Care Contract...*" to provide such support as is set out in such contract. No such contract was entered into in this case.

15. As far as the Respondent's costs of representation are concerned, it is claimed by them that no order should be made preventing such costs being recovered as part of any future service charge. However, it seems to the Tribunal that no such costs could be claimed anyway. There are only 2 provisions in the lease which could be used i.e. clauses 3.11 and 7.4.3. With the first one, there is no suggestion of forfeiture or a breach in the terms of the lease. With the second one, the Upper Tribunal has said on many occasions that legal costs incurred in the management or maintenance of a development do not cover costs of representation in a court or Tribunal unless the wording is clear and unequivocal, which it is not.

The Law

16. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'.

17. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. This Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable and, if so, whether it is payable.

The Inspection

18. The members of the Tribunal did not inspect the property as it was not appropriate in view of the nature of this dispute.

The Hearing

19. In the application, the Applicant said that she was content for this case to be determined by the Tribunal on a consideration of the papers and written representations only. The Tribunal agreed with this and said that a determination would not be made before 2nd June 2017. Both parties were told that if they wanted an oral hearing, then one would be arranged. No

such request was received by the Tribunal and there has thus been no oral hearing.

20. Having said that, the Tribunal wants the parties to appreciate that whilst all their points may not have been specifically referred to in this decision, all such points have been taken into account.

Discussion

21. In general terms, this has been a difficult case. The Applicant and at least one other long leaseholder feel that they should not have to pay over £700.00 per annum for something they don't want. On the other hand it seems clear from the Respondent's evidence that at least 10 other long leaseholders want the service to be provided. The Respondent states that it was 11 but one of the people they say want the service to continue has provided an e-mail to the effect that this is not what that person said.

22. In some documents signed by the Applicant at pages 113 and 114 in the bundle, it is said that she was going to be charged £78 per month as a 'Wellbeing Charge'. These appear to be documents signed before she entered into the contract. As no other documents or comments have been provided, it is assumed that the Applicant accepts this and did not raise any question about what this related to. Thus, despite her assertions, it does seem that she was told she would be charged over £900 for a service and the Respondent says that this is the care cost which is in dispute.

23. The other point is that if this cost is not a service charge, then the Respondent will clearly have to abandon the service and if any leaseholder then wanted to contract for the service on an individual basis, the cost is clearly going to be a great deal more than the amount which is being charged because the cost is unlikely to change and will be split between fewer people. The Respondent would also be in some difficulty in complying with the clause in the lease which requires it to arrange for answering emergency calls.

24. It is assumed that none of the pre-contract advertising and promotional material offers any assistance with regard to whether prospective leaseholders were made aware of the charge. However, agreeing to have a flat with emergency alarms and a landlord's covenant to arrange for emergency calls to be answered, would certainly tend to suggest that the landlord was going to provide some sort of service which would have to be paid for by each leaseholder as part of the service charges. It is noted that on page 112 in the bundle, in the 'frequently asked questions' leaflet there is specific reference to care being provided from 10.00 pm to 7.00 am and 'all customers' paying towards it.

25. The witness, Mr. Brown, is somewhat dismissive of the 'service' provided i.e. that the people involved in providing the service are young, "*often with limited command of English*" and with no medical training. He says that the service can delay access to real emergency service providers. The problem with this is that if someone has slipped over or is having a fit or seizure, the Respondent's comment that immediate attention, even by someone not medically trained, could mean the difference between life and death has some substance to it.

Conclusions

26. The Tribunal, having taken all the evidence and submissions into account, determines that the lease, even though not particularly clear, does allow the Respondent to provide the disputed care service and to charge for it. It has provided evidence that it is monitoring the situation to ensure that residents still want the service.

Costs

27. The question of the Respondent's costs of representation has been mentioned above. In other words, the lease probably doesn't allow it anyway. However, as an application has been made for an order under section 20C of the 1985 Act, the Tribunal considers that it should deal with this. In essence, this case has cost both parties a great deal of time and effort. The Tribunal obviously does not know whether the Applicant took legal advice but if so, and such advice had been taken, it would probably have saved much in time and expense if she had.

28. Whilst the somewhat confusing lease was down to the Respondent's then legal advisors, the lease terms are, in the Tribunal's opinion, clear enough and it is not considered that an order under section 20C would be just and equitable.

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Bruce Edgington
Regional Judge
2nd June 2017

ANNEX - RIGHTS OF APPEAL

i. 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 Tribunal at the Regional office which has been dealing with the case.

ii. 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.

iii. If the application is not made within the 28 day time limit, such application must include a request for 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.

iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. 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.