FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/41UD/LIS/2019/0019**
Property	**:**	**Marina View Tamworth B78 3BF**
Applicants	**:**	**Fairhold Properties No. 6 Ltd (1)** **Brigante Properties Ltd (2)** **Fairhold Properties No.4 Ltd (3)** **Fairhold Properties No. 8 Ltd (4)**
Representative	**:**	**Estates and Management Limited**
Respondents	**:**	**Marina View Fazeley Limited (1)** **The Leaseholders (2)**
Representative	**:**	**Somerfield & Co. solicitors** **(First Respondent and Block A leaseholders only)**
Type of Application	**:**	**Service charges (section 27A LTA 1985)**
Tribunal	**:**	**Judge D Jackson**
Date of Decision	**:**	**10 December 2019**

DECISION

Background

1. Marina View ("the Development") comprises 5 Blocks containing a total of 57 Apartments all held on long residential leases. The Development was completed in 2007/2008 by Barratt Homes Limited ("Barratt").
2. The present freeholders are

   Block A (Apartments 1-9) – First Respondent (SF530136)
   Block B (Apartments 10-16) – First Applicant (SF543443)
   Block C1 (Apartments 17-22) – Second Applicant (SF530137)
   Block C2/D (Apartments 23-24) – Third Applicant (SF536435)
   Block E/F (Apartments 35-58) – Fourth Applicant (SF343043)

3. The residential Leases of the Apartments granted by Barratt Homes are, for present purposes, in common form. Clause 2 of Part One of the Eighth Schedule contains a Covenant by the Lessee to pay to the Lessor the Lessee's Proportion. The Lessee's Proportion of Maintenance Expenses is payable in accordance with the Seventh Schedule. The Maintenance Expenses, being monies expended or reserved by the Lessor, are set out in the Sixth Schedule.
4. The Sixth Schedule separates Maintenance Expenses into Part A ("Estate Costs"), Part B ("Block costs") and Part C (costs applicable to any or all of the previous parts of this schedule). The Part A Proportion and the Part B Proportion payable by each individual leaseholder is set out in the Particulars to the Lease subject to the following proviso:

   "SAVE THAT any of the said Proportions may be subject to variation from time to time in accordance with the provisions of Clause 7.10"

   By letter dated 26th September 2019 the Applicants' representative, at the request of the Tribunal, conducted a review of sample Lease: "However, none of the leases actually contain a clause 7.10, and further no such variation provisions are contained elsewhere in the leases".

5. Following the grant of the long leases Barratt disposed of their interest in the Development in varies stages and the freeholds of the Blocks were purchased by different companies. In relation to Blocks B, C1, C2/D and E/F the freeholds were purchased by the Applicants. However, this did not, of itself, prove to be problematic because all 4 Applicants are part of the Consensus Business Group. The difficulty which has led to the present application arose because the freehold of Block A was sold on 1st March 2016 to the First Respondent which is owned by the Leaseholders of Apartments 1-9. Since that time the leaseholders of Block A and the First Respondent have refused to pay any Part B costs to the Applicants.
6. The Tribunal is being asked to resolve the dispute that has arisen between the Applicants on one side and First Respondent and the Leaseholders of Block A on the other. There is no dispute in relation to Part A ("Estate Costs") and no issue between the parties as to the recovery of those costs by the Applicants from the Block A leaseholders and/or the First Respondent. However, in relation to Part B ("Block Costs") the leaseholders of Block A are self maintaining their Block through the First Respondent and refuse to pay to any of the Applicants their respective Lessee's Proportion in relation to Part B costs.

7. This has placed the Applicants in some difficulties. Firstly, the service charge mechanism set up by Barratt provided for 100% recovery of all service charges for both Part A and Part B costs. The position of the First Respondent and Block A Leaseholders means that there is now a 15.79% shortfall in relation to Part B costs. Secondly, the Applicants are unable to take the step of varying the Part B proportion payable by the Leaseholders of Blocks B, C1, C2/D and E/F because none of the Leases contain clause 7.10.
8. Accordingly, by application dated 24th May 2019 the Applicants made application to the Tribunal for a determination of liability to pay and reasonableness of service charges under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act").

The Question for the Tribunal to decide

9. The Applicants seek that the historic Part B Services for years 2016-2018 be:

    a) Payable by all of the Second Respondent leaseholders, being their specified Part B Proportion of the whole of the Part B Services provided for all Blocks at the Development to ensure 100% recovery by the Applicants and/ or the First Respondent.
    b) In the event of (a) above, the Part B Services for years 2016-2018 be determined reasonable and payable by the First Respondent and Second Respondent leaseholders of Block A.

10. The Applicants also ask the Tribunal to determine that the service charges in respect of the Part B Services for 2019 onwards be:

    a) Payable by all of the Second Respondent leaseholders, being their specified Part B Proportion of the whole of the Part B Services provided for all Blocks at the Development to ensure 100% recovery by the Applicants and/ or the First Respondent.
    b) In the event of (a) above, the Part B Services for years 2016-2018 be determined reasonable and payable the Second Respondent Lessees.

11. On 30th May 2019 I issued Directions requiring, inter alia, that the Applicants serve a copy of their application on all leaseholders at the Development. The Applicants have prepared a detailed Statement of Case served on 27th June 2019 in accordance with my Directions. None of the Leaseholders at the Development has notified the Tribunal of opposition to the application as required by paragraphs 7 and 8 of my Directions other than the Leaseholders of Block A. In accordance with paragraph 9 of Directions the First Respondent made application for an Order under section 20C of the 1985 Act (application form dated 15th July 2019).

Preliminary Issue

12. On 25th September 2019 I held a Case Management Conference at which I directed that the Tribunal should decide the following issue as a preliminary issue under Rule

6(3)(g) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013:

"Are Block Costs under Part "B" of the Sixth Schedule to the Lease, being a part of the Lessees Proportion of the Maintenance Expenses to be determined in accordance with the Seventh Schedule, payable in accordance with paragraph 2 of Part One of the Eighth Schedule by the Leaseholders of Block A (Apartments 1-9, Marina View) to the Applicants?"

13. In determining the preliminary issue, I have considered Applicant's Submissions served on 22nd October 2019 prepared by Milton McIntosh (In-House solicitor, Estates and Management) and Respondent's Submissions dated 18th November 2019 prepared by JR Gale of counsel.
14. Both parties have requested that the preliminary issue be determined without an oral hearing.

Deliberation

15. Mr McIntosh for the Applicants submits, at paragraph 10 of Applicants' Submissions:

"The Applicants have "stepped into the shoes" of the original developer, Barratt Homes for the purposes of dealing with Maintenance Expenses. Both the burden of the covenants with lessees to provide the relevant services and the benefit of the lessees' covenants to pay for those services passed when each of the Applicants acquired their part of the freehold."

16. Mr McIntosh relies on section 3 of the Landlord and Tenant (Covenants) Act 1995 with particular emphasis on sub-section 3(3), in support of his submission:

3. Transmission of benefit and burden of covenants.

(1) The benefit and burden of all landlord and tenant covenants of a tenancy—

(a)shall be annexed and incident to the whole, and to each and every part, of the premises demised by the tenancy and of the reversion in them, and
(b)shall in accordance with this section pass on an assignment of the whole or any part of those premises or of the reversion in them.

(2) ....

(3) Where the assignment is by the landlord under the tenancy, then as from the assignment the assignee—

(a)becomes bound by the landlord covenants of the tenancy except to the extent that—
(i)immediately before the assignment they did not bind the assignor, or

(ii)they fall to be complied with in relation to any demised premises not comprised in the assignment; and
(b)becomes entitled to the benefit of the tenant covenants of the tenancy except to the extent that they fall to be complied with in relation to any such premises.

17. The situation under consideration is the acquisition of the freehold of Block A by the First Respondent in 2016. In the language of the 1995 Act that is an "assignment of the reversion". Section 3(1)(b) sets out that the benefit and burden of both landlord and tenant covenants shall pass on an assignment of the reversion "in accordance with this section".
18. Subsection 3(3), as Mr McIntosh rightly points out, deals with the situation that arose when the First Respondent acquired the freehold in 2016 1.e. assignment by the landlord of the reversion. However, Mr McIntosh's submissions are not supported by the provisions of section 3(3). Subsection 3(3)(a) provides that the assignee (in this case the First Respondent) becomes bound by the landlord covenants. Subsection 3(3)(b) further provides that the assignee (the First Respondent) becomes entitled to the benefit of the tenant covenants.
19. Accordingly, section 3(3) assists the assignee i.e. the First Respondent but does not assist the Applicants in any way at all. The submissions made by the Applicants are misconceived. The 1995 Act is concerned with "each and every part, of the premises demised by the tenancy and of the reversion in them". The "premises demised by the tenancy" are the individual apartments. The Act is not concerned with the Development as a whole but only the "reversion in them" which for the purposes of the present application means the freehold interest in the Block A apartments. The Applicants acquisition of "their part of the freehold" is irrelevant – what matters is the "premises demised in the tenancy". The Applicants have never held the reversion to the leases under which the Leaseholders of Block A hold their apartments. Following the transfer in 2016 the reversion to "the premises held under the tenancy" is now held by the First Respondent.
20. Mr McIntosh refers to the Applicants "part of the freehold". This may be an oblique reference to section 28 of the 1995 Act which sets out the regime which applies where covenants (whether or not to pay money) fall to be complied with in relation to a particular part *of the premises demised by a tenancy*. Again the 1995 Act is concerned with covenants that apply to the tenancy i.e. the apartments and not with the Development as a whole. The transfer of part or otherwise of the Development is irrelevant. What matters for the purposes of the 1995 Act is the premises demised in the tenancy i.e. the individual apartments. The situation in relation to the Block A apartments is straightforward. The whole of the freehold reversion to each of the Block A apartments was transferred to the First Respondent in 2016. The benefit and burden of the Block A lessee covenants have passed to the First Respondent and it is the First Respondent alone which can enforce those covenants. The freehold ownership of the rest of the Development is irrelevant.
21. As far as the First Respondent is concerned it is a freeholder and not a tenant. Accordingly, the First Respondent does not pay a service charge as defined in the 1985 Act. The situation that has arisen might have been avoided if some mechanism had been included within the 2016 Transfer of the freehold of Block A to the First Respondent requiring it to account to the Applicants in relation to the provision of service to Block A. However, Mr McIntosh told the Tribunal at the case management conference that no such provision was included. There is therefore no contractual relationship whatsoever between the First Respondent and the Applicants requiring

the First Respondent to pay or collect a service charge on behalf of the Applicants in relation to Block A.

22. In am persuaded by the submissions of JR Gale. Firstly, as rightly pointed out in Respondents' Submissions at paragraph 22 there is neither privity of contract nor privity of estate between the Applicants and either the First Respondent or the Leaseholders of Block A. Secondly the Applicants are assignees of Blocks B, C1, C2/D and E/F. The Applicants have never been the assignees of the reversion of Block A (paragraph 23 of Respondents' Submissions). By way of emphasis (paragraph 30) counsel for the Respondents reiterates the point that the Applicants are "a non-party to the lease, who did not own the reversion". Finally, at, paragraph 38, counsel also makes the practical point that as the Applicants have no lawful right to enter Block A they are unable to carry out works in terms of services to be carried for maintaining Block A.
23. I am invited by the Respondents to answer the preliminary question in the negative. I do so. I am further invited to strike out the application. It is not necessary for me to do so. My determination in relation to the preliminary issue is sufficient to dispose of both the questions raised by the application as set out at paragraphs 9 and 10 above.

Decision

24. Pursuant to section 27A (1) (a) and (b) of the Landlord and Tenant Act 1985 I determine that historic Block Costs for the years 2016-2018 under Part "B" of the Sixth Schedule to the Leases, being a part of the Lessees Proportion of the Maintenance Expenses to be determined in accordance with the Seventh Schedule, payable in accordance with paragraph 2 of Part One of the Eighth Schedule are not payable by either the Leaseholders of Block A (Apartments 1-9, Marina View) or the First Respondent to the Applicants.
25. Pursuant to section 27A (3) (a) and (b) of the Landlord and Tenant Act 1985 I determine that Block Costs for 2019 onwards under Part "B" of the Sixth Schedule to the Leases, being a part of the Lessees Proportion of the Maintenance Expenses to be determined in accordance with the Seventh Schedule, payable in accordance with paragraph 2 of Part One of the Eighth Schedule are not payable by either the Leaseholders of Block A (Apartments 1-9, Marina View) or the First Respondent to the Applicants.

D Jackson
Judge of the First-tier Tribunal

Either party may appeal this Decision to the Upper Tribunal (Lands Chamber) but must first apply to the First-tier Tribunal for permission. Any application for permission must be in writing, stating grounds relied upon, and be received by the First-tier Tribunal no later than 28 days after the Tribunal sends its written reasons for the Decision to the party seeking permission.

DIRECTIONS

There are two outstanding matters namely application for an Order under section 20C of the 1985 Act and the application for costs under Rule 13 made by the Respondents (for the purposes of these Directions – the First Respondent and the Leaseholders of Block A only).

I note that the section 20C has been made by the First Respondent rather than the leaseholders of Block A. As the leaseholders rather than the First Respondent actually pay service charges it may be that any Order should be made in favour of the leaseholders of Block A and the section 20C application amended accordingly

1. No later than 6th January 2019 the Respondents shall provide to the Applicants and the Tribunal a Schedule of Costs claimed and clarification in relation to the section 20C application.
2. No later than 27th January 2019 the Applicants must provide to the Respondents and the Tribunal a submission in Reply to the Rule 13 and section 20C applications.
3. Unless either party requests an oral hearing within the next 28 days the Tribunal will deal with these outstanding applications without an oral hearing.