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

Case Reference : **BIR/37UC/LIS/2016/0034**

Property : **31 Charter Court
Retford DN22 7ZA**

Applicants : **Mr and Mrs. Brown**

Respondent : **McCarthy & Stone Retirement
Lifestyles Limited**

Representative : **SLC Solicitors**

Type of Application : **s27a and s20c of the Landlord &
Tenant Act 1985**

Tribunal Members : **Mrs A J Rawlence M.R.I.C.S
Mr. P. Hawksworth**

Date of Decision : **26 January 2017**

DECISION

Preliminary

1. On 12 October 2016 an Application ('the Application') was made under section 27A of the Landlord & Tenant Act 1985 ('the 1985 Act') for a determination of liability to pay and reasonableness of service charges with regard to the employment of a resident manager compared with that of a day manager for 31 Charter Court, Retford ("the property").
2. The Applicants confirmed that they also wished to make an application under section 20C of the 1985 Act.
3. Directions were issued on 17 October 2016.

The Relevant Law

4. The starting point of the Tribunal's consideration is its jurisdiction in respect of service charge applications.
5. Under section 27A (1) of the 1985 Act the Tribunal has jurisdiction to decide whether a service charge is payable and if it is the Tribunal may also decide:
 - 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.
6. A charge is only payable by a lessee if the terms of the lease permit the lessor to charge for specific services. The general rule is that service charge clauses in a lease are to be construed restrictively, and only those items clearly included in the lease can be recovered as a charge (*Gilje v Charlgrove Securities* [2002] 1 EGLR 41).

Section 20 C Application

7. The Applicants had requested that the Tribunal make an Order under section 20C of the Act that the costs of the Respondent in connection with the Tribunal 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 Applicants.

The Lease

8. The Lease for the property is dated 30 April 2009 and made between the Landlord McCarthy & Stone Retirements Lifestyles Limited and the Tenants John and Elizabeth Brown.

9. Services are defined in the Lease in Clause 1:

“The service rendered works undertaken and obligations assumed by the landlord pursuant to the covenants by the landlord contained in the Sixth Schedule and under the provisions of the Fourth Schedule and any other services provided by the landlord to the estate for the benefit of the tenants thereof.”

10. In the Fourth Schedule to the Lease Paragraph 3 the Tenant will pay to the Landlord or to whom the landlord may specify the Service Charge in accordance with the provisions of that Schedule.

11. In the Fifth Schedule of the Lease the Tenant covenants to pay the Rent and Service charge on the days and in the manner specified.

12. Under the Sixth Schedule Paragraph 7 the landlord covenants with the Tenant as follows:

“So far as practicable (and subject to paragraph 4.2 of Part II of the Second Schedule) to use its best endeavours to provide and maintain the services of a Manager (and Deputy Manager, if appropriate) for the purpose of being available to the tenants in the Building during reasonable hours of the daytime to render such assistance in cases of emergency as may reasonably be expected of a person in such a position possessing no medical or other special qualification or skill and to supervise the provision of services in the Building and on the Estate and to perform such other duties as the Landlord may in its discretion stipulate together with an emergency call system connected to a central control for the purpose of providing assistance in cases of emergency and in the short term or temporary absence of a Manager and whilst the Manager is off-duty.”

13. Clause 1 of the Lease defines Manager as:

“the person or persons employed by the Landlord or its agent for the purposes of being available to the tenants in the Building during reasonable hours of the daytime to render such assistance in cases of emergency as may reasonably be expected of a person of such position possessing no medical or other special qualification or skill and to monitor on a day-to-day basis the provision of services in the Building and on the Estate such person or persons being either a Day Manager or a resident House Manager (if accommodation is from time to time designated with the Building by the Landlord or occupation by a House Manager).”

Inspection

14. The property was inspected on 17 January 2017 by the Tribunal in the presence of the Applicants and the current resident manager Mrs. Jane Jackson.

15. Charter Court is a purpose built development of one and two bedroom retirement apartments with easy access to Retford Town Centre. The Applicants own a two bedroom apartment and Mrs. Jackson occupies another two bedroom apartment as the resident manager.
16. By the front door is a key locker which can be unlocked remotely by Careline, the company who provides out of hours assistance.

Representations

17. Written Representations had been received from both Parties.
18. The Applicants' Statement of Case, dated 7 November 2016, referred to the previous Tribunal Decision of 23 January 2013 (reference BIR/37UC/LSC/2012/0041). In this decision it was determined that the extra cost for a resident manager compared to a day manager was £3.24 per week for a two bedroom apartment and the Applicants sought a reduction of £4.24 in the service charge for the period 2013 to 2017.
19. In March 2013 the Landlord's Managing Agents, Peverel Management Services, appointed a resident manager and established that it was not unreasonable for her to spend a maximum of two nights a week away from the development to rest, recuperate and/or pursue other interests.
20. On 1 March 2014 the management of the property transferred to McCarthy & Stone Management Services (the current managing agents) and they were obliged, under the Transfer of Undertakings (Protection of Employment) Regulations 2006, to maintain the same employment rights.
21. During the period March 2013 to April 2015 the then resident manager left Charter Court on Friday evening and returned on Sunday evening.
22. The Applicants stated that both management companies have breached the Tribunal's previous decision in respect of establishing that the resident manager could be off site for two nights a week and, thus, have no responsibility for emergency calls. The Respondent stated that an external agency deals with emergency procedure and clarified that this happens with or without the involvement of the resident manager. Therefore whether the manager was sleeping at the development or not would not affect the role of the external agency.
23. The Tribunal's decision stated that the resident manager offered a higher level of service than the day manager. The additional benefits were a direct consequence of the resident manager living on site which translated into the reassurance of being a good neighbour and more likely to be on hand when an emergency occurred.
24. The Applicants included copy letter from the Respondent dated 21 November 2014 which stated at paragraph 4:

“I would like to re-iterate that it is deemed acceptable that a Residential House Manager may spend time away from the development, at weekends for example. This is within the terms of the lease, and within the scope of what was envisaged and reviewed by the Tribunal. It would not be reasonable to expect them to be on site at all times.”

25. The Applicants sought a determination that:

i. The Respondent had acted unreasonably by appointing a Residential House Manager since March 2013. The criteria of the appointment did and still do not comply with the finding of fact on which the Tribunal based its decision on a residential manager being reasonably employed.

ii. The cost of £4.24 cannot be included in the service charge from March 2013 as it was not reasonably incurred and is not legally due. The cost was a direct result of the findings of the Tribunal as to the benefits of the resident manager living on site.

iii. The charge is not reasonably incurred as the Respondent is unable, as evidenced over the past two years, to apply for breach of covenant against the Applicant.

iv. The charge of £4.24 since March 2013 is not necessarily and reasonably incurred. The Respondent states that emergency services are provided by an outside agency with or without the involvement of the resident manager. Whether the manager was sleeping at the development or not would not affect this. The Tribunal under items 83(5) under finding of facts states: “The resident manager offered a higher level of service than the day manager. The additional benefits were a direct consequence of the resident manager living on site translated into the reassurance of being a good neighbour and more likely to be on hand when an emergency occurred.”

26. The Applicants also sought a determination that no resident should be responsible for legal costs involved with the Application as the Respondent had incorrectly interpreted the decision of January 2013 and that the Respondent had the opportunity of legal avenues to resolve this individual issue, with costs awarded against the Applicants if successful.

27. The Respondent’s Statement of Case confirmed that they were legally unable to require the residential manager to be at the Property 24 hours a day 365 days a year.

28. The Respondent, as the resident manager’s employer, was bound by the Transfer of Undertakings (Protection of Employment) Regulations 2006 and the Working Time Regulations 1998.

29. The Applicants had produced no evidence of what the cost of a resident manager was compared to a day manager.

30. The previous Tribunal decision had not made a determination in respect of the difference between the two types of manager but had specifically said:

“The Tribunal....considers this comparison with the charges for the day manager deflected attention away from the correct question which is: are the charges for the resident manager necessarily and reasonably incurred.”

The Tribunal concluded “The Tribunal is satisfied that the costs to be included in the service charge for a resident manager at Charter Court are reasonably incurred.”

31. The Respondent was opposed to the s20C application:
- i. Clause 1.2.5 of the Fourth Schedule to the Lease authorised the recovery of legal costs incurred in these proceedings through the service charge.
 - ii. The Application was a duplicate of two previous Tribunal applications and the two County Court claims issued.

Decision

32. The Tribunal had previously determined that the Respondent had acted reasonably in appointing a resident manager at Charter Court.
33. In the Lease, Sixth Schedule Paragraph 7, the Landlord covenants “So far as practicable to use its best endeavours to provide and maintain the services of a Manager (and Deputy Manager, if appropriate) for the purpose of being available to the tenants in the Building during reasonable hours of the daytime.....” The Tribunal notes that the resident manager is contracted to provide cover Monday to Friday 9am to 5pm and this is reflected in the salary paid. The Tribunal has no doubt that, if weekend daytime cover was provided, this would incur an additional charge to the residents. It further refers to the previous decision paragraph 71 when a document was shown to the Tribunal detailing the hours a resident manager normally worked which was Monday to Friday 9am to 5pm with an hour for lunch. The document continued that the resident manager did not normally work evenings or at the weekend but when on site would normally be the first point of contact in the event of an emergency arising outside normal duty periods. This is currently the situation with Mrs. Jackson as resident manager.
34. The question facing the Tribunal is did the appointment of a resident manager in the period March 2013 to April 2015 infringe either the Lease or the Tribunal’s decision of January 2013 because the manager was away from the property on Friday and Saturday nights?

35. The Lease stipulates that the landlord will use its best endeavours to provide and maintain the services of a manager for the purpose of being available during reasonable hours of the daytime. The Tribunal determines that there is no legal commitment under the Lease for a resident manager to provide services outside normal working hours. The words "so far as practicable" at the commencement of the Sixth Schedule of the Lease, clause 7, preclude the Respondent from being obliged to provide seven days per week, twenty-four hours per day managerial cover. To achieve that end would require extra cover to be employed in any event which would neither be practicable nor cheap. Indeed, the Tribunal is of the view that the cost of extra on-site cover for night times and weekends would be much more than the sum per week in dispute in this case.

36. The relevant paragraphs of the previous Tribunal decision are set out as follows:

37. '71. *The duties of a resident manager were set out in a document¹ given to all leaseholders. The role of the resident manager was described as a reassuring presence, acting as the Management Company's manager on the spot. The document stated that a resident manager normally worked five days a week (Monday to Friday) and usually on duty from 9.00am to 5.00pm with an hour for lunch. Further the resident manager did not normally work evenings or at the weekend but when on site would normally be the first point of contact in the event of an emergency arising outside normal duty periods.'*

38. '77. *The contract of employment for a resident manager required the manager to deal with emergencies outside normal working hours and outside excluded hours. In the case of an absolute emergency the normal off duty hours of the resident manager were suspended until the emergency had been resolved or alternative assistance had been put in place. The apartment occupied by the resident manager was provided by the Respondent solely for the better performance of the manager's duties. Mr Whalley's evidence was that the resident manager was required as part of her conditions of employment to reside at the apartment from Monday to Friday evening.'*

39. '78. *Mr Brown appeared to suggest that the Respondent would be in breach of the EU Working Time Directive if a resident manager was dealing with emergencies on a regular basis. Mr Brown, however, did not substantiate his argument with reference to the facts of this case. The Tribunal considers the inclusion of compensatory rest in the manager's contract of employment for handling absolute emergencies*

¹ Mr. Barr produced a copy of the document to the Tribunal which carried the reference PIP MSD Feb 08.

was an indication of the Respondent's adherence to the Working Time Directive.'

- 40.'79. *The Tribunal is satisfied that the resident manager offered a higher level of service than that provided by the day manager. The additional benefits were a direct consequence of the resident manager living on site which translated into the extra reassurance of being a good neighbour and more likely to be on hand than a day manager when an emergency occurred.'*
- 41.'80. *Mr Brown considered that the Respondent was not entitled to rely on these additional benefits because they were not incorporated in a specific contract between the Respondent and the leaseholders. Mr Brown's contention was influenced by Peverel's response of 16 February 2011 to his complaint on the level of services during Ms Drury's illness which justified the lower level of service by reference to the specific terms of the lease. It required the intervention of Mr Johnson, the Respondent's then Regional Managing Director, to address the perceived injustice felt by the leaseholders by the making of an ex gratia payment of £50 to each of the residents.'*
- 42.'81. *The Tribunal disagrees with Mr Brown's submission. The Respondent has given an acceptable explanation why the additional benefits of the resident manager were not spelt out in the lease because they could not be guaranteed due to the legal requirements of the manager's contract of employment. The Respondent has under the lease supplemented the manager's service by the provision of an emergency call system (Careline) to ensure that emergencies are always dealt with. The Tribunal notes the Respondent's statement that there was no documentary evidence of the additional benefits. The Tribunal, however, considers that they were self evident from the duties of a resident manager set out in the document referred to in paragraph 71 above given to all leaseholders.'*
- 43.'82'. *The Tribunal is of the view that although the additional benefits were not incorporated in the lease the leaseholders were not without recourse to a remedy if the Respondent failed to deliver on the additional benefits. The benefits go to the standard of services provided, and if the resident manager did not act as a good neighbour or attend to emergencies when on site the leaseholders may have a right of action to challenge the reasonableness of the charge. The Tribunal considers Mr Johnson's action to make an ex gratia award implicitly recognised the connection of additional benefits with the level of services provided.'*
- 44.'83. *The Tribunal makes the following findings of fact derived from the above consideration:*
- (1) *The provision of the services of a resident manager was compatible with the requirements of a private leasehold development for older people.*

(2) *The Respondent sold the apartments at Charter Court on the basis that the services of a resident manager would be supplied, which was a major factor for some leaseholders when they purchased their apartment.*

(3) *The Respondent adhered to approved management practice by following the guidelines for consulting with residents as set out in the ARHM Code when considering Mr Brown's request to change the status of the manager.*

(4) *The Respondent's refusal to entertain a change from a resident to a day manager was in accordance with approved practice for the management of private leasehold retirement housing and protected the interests of a significant minority of leaseholders.*

(5) *The resident manager offered a higher level of service than that provided by the day manager. The additional benefits were a direct consequence of the resident manager living on site which translated into the extra reassurance of being a good neighbour and more likely to be on hand than a day manager when an emergency occurred.'*

45.'84. *Given the above findings the Tribunal is satisfied that the Respondent has acted reasonably by its intention to appoint a resident manager at Charter Court.'*

46.'86. *The Tribunal examines reasonableness of the amounts charged in the context of section 19 of the 1985 Act from a different perspective than that adopted by Mr Brown. In the Tribunal's view, reasonableness connotes a more rounded concept than simply a direct relationship between the price paid and the services provided. This difference is best illustrated by the attendance of a manager at emergencies. Mr Brown would say that this aspect of the resident manager's service should be ignored in assessing the reasonableness of the charge because the manager is entitled to receive an additional payment for her attendance. The Tribunal in contrast considers Mr Brown's view represents a partial picture of the position in that it overlooks the benefit of a having somebody on the spot to attend to an emergency which is more likely if a resident manager is in place.'*

47.'91. *The Tribunal finds that the higher charge for a resident manager was explained by the accommodation costs which resulted in a relatively small increase over the charge for a day manager. In Mr Barr's words this increase was equivalent to the cost of a weekly cup of coffee and cake which was a price worth paying for the benefit of having a good neighbour in the shape of a resident manager.'*

48.'92. *The Tribunal, however, considers this comparison with the charges for the day manager deflected attention away from the correct question which is: are the charges for the resident manager necessarily and reasonably incurred?'*

49. '97. *Having regard to the above findings the Tribunal is satisfied that the costs to be included in the service charge for a resident manager at Charter Court are reasonably incurred.'*

50. The Tribunal notes the Applicants' inclusion of the letter dated 21 November 2014, (see paragraph 24 above). However, in the previous Tribunal decision, the Tribunal did **not** determine that the resident manager would be required to reside at Charter Court at the weekend.

51. At paragraph 82 of the previous decision the Tribunal was of the opinion that, although the additional benefits were not incorporated in the lease, the leaseholders were not without recourse to a remedy if the Respondent failed to deliver on the additional benefits. The benefits go to the standard of services provided, and if the resident manager did not act as a good neighbour or attend to emergencies **when on site** the leaseholders may have a right of action to challenge the reasonableness of the charge.

52. The Applicants sought a determination on the following points (see paragraph 25):

i. The Respondent had acted unreasonably with appointing a Residential House Manager since March 2013. The criteria of the appointment did and still do not comply with the finding of fact on which the tribunal based its decision on a residential manager being reasonably employed.

The Tribunal finds that the Respondent had employed a resident manager who was engaged to work Monday to Friday 9am to 5pm and to act as a good neighbour or attend to emergencies when on site. The Tribunal determines that it was reasonable to appoint a resident manager on these terms.

ii. The cost of £4.24 cannot be included in the service charge from March 2013 as it was not reasonably incurred and is not legally due. The Tribunal determines that the figure of £4.24, although not confirmed in the previous decision (see paragraph 48), relates to the difference between a day manager and a resident manager and the enhanced benefits (as specified in the previous decision of the Tribunal) of having the latter. The post holders since March 2013 have both been in residence.

iii. the charge is not reasonably incurred as the Respondent is unable, as evidence over the past two years, to apply for breach of covenant against the Applicant. This point is outside the jurisdiction of the tribunal, as previously notified.

iv. The charge of £4.24 since March is not necessarily and reasonably incurred. The Respondent states that emergency services are provided by an outside agency with or without the involvement of the Residential House Manager. The Tribunal determines that the figure of £4.24, although not confirmed in the previous decision see paragraph 48,

relates to the difference between a day manager and a resident manager. The post holders since March 2013 have both lived at Charter Court.

53. The Applicants sought for determinations for the service charge years, 2013, 2014, 2015, 2016 and 2017. The Tribunal determines that the service charge for a residential manager is payable for the periods 2013 to 2016. It is too early to determine for the period 2017 but, assuming the enhanced benefits continue, in all probability it will be reasonable to make such a charge.
54. With regard to the section 20(c) Application, the Tribunal finds that the Applicants have failed to prove that the criteria of the appointment of a resident manager were not satisfied and, thus, their Application has been unsuccessful. The Respondents have pointed out that the previous Tribunal decision ruled on both the appointment of a resident manager and the reasonableness of the service charge. The Tribunal determines that the section 20(c) Application fails and the cost of defending this application may be part of a service charge.
55. If either party is dissatisfied with this decision they may apply for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be made to the First-tier Tribunal within 28 days of this decision (Rule 52 (2)) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Anthea J Rawlence
Chairman