



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

Case Reference : **CAM/26UD/LSC/2017/0042**

Property : **115 Ware Road, Hertford SG13 7EE**

Applicant : **Ms Alana Robertson**

Representative : **In Person**

Respondent : **Ms Joy Gilson**

Representative : **In Person**

Type of Application : **Court referral – S27A Landlord and Tenant Act 1985 – determination of service charges payable**

Tribunal Members : **Judge John Hewitt
Mr Stephen Moll FRICS
Mr John Francis QPM**

Date and venue of hearing : **22 June 2017
Harlow Magistrates Court**

Date of Decision : **23 June 2017**

DECISION/REPORT TO THE COURT

The tribunal's report to the court

1. In respect of Claim No. C6QZ68G4 District Judge Pollard made on order on 14 March 2017 in the following terms:

“Upon the parties agreeing that the matter concerning the service/maintenance charge be referred to the First Tier Tribunal (Property Chamber) and the parties further agreeing that they will seek the rectification/recalculate [sic] of the maintenance charges under the 6 leases of the property at 115 Ware Road, Hertford, SG13 7EE whose total percentage is 107% rather than 100%.

IT IS ORDERED THAT

1. *The matter be stayed pending the case being transferred to the First Tier Tribunal (Property Chamber).”*
2. Directions were given by the tribunal and the matter came on for hearing before us on 22 June 2017.
3. Our report to the court is as follows:
 - 3.1 The order appears to be predicated on the basis that on a transfer by the court this tribunal has jurisdiction to give effect to the parties' agreement that the tribunal rectify/recalculate the service charges payable by the tenant of the six leases where the total contractual percentage recovery is 107% rather than 100%;
 - 3.2 The claim made in the court proceedings is not a claim for the payment of a service charge pursuant to a lease; but a claim by one co-owner of a property against the other co-owner for a contribution to costs of repairs pursuant to an oral agreement or course of dealings that such costs are shared equally;
 - 3.3 The issues raised by the parties in the statements of case served in these proceedings go much further than simply re-calibrating the service charge percentages set out in the six leases.
 - 3.4 By section 35 Landlord and Tenant Act 1987 the tribunal has a limited jurisdiction to vary a lease but an application in proper form must be made to the tribunal and no such application has been made.
 - 3.5 In case it may be of assistance to the court there is attached to this report a copy of a set of notes which were prepared by the tribunal for the hearing. Copies of these notes were handed to the parties at the hearing and discussed with them.
 - 3.6 The parties confirmed that in 2001 they purchased the freehold interest as tenants in common in equal shares.
 - 3.7 Since the purchase the parties have never operated the service charge regime as set out in the leases. Instead the relationship has been one of co-owners; over the years most issues concerning the management and development of the property have been arrived mutually and the costs of maintenance, repairs and insurance have been shared on an agreed basis,

mostly, but not exclusively, on a 50/50 basis and with an occasional cash reconciliation from time to time.

- 3.8 Ms Robertson contends that the cost of the guttering which forms the basis of the court claim was also to be shared equally. Ms Gilson contends that some 2 or 3 years ago it was agreed that the leases would be varied in a number of respects to include an adjustment of percentages to reflect floor area and that hence forward the costs of maintenance, repairs and insurance incurred by them as co-owners would also be shared in a similar proportion. If Ms Gilson is right that would be about 33% to Ms Gilson and 67% to Ms Robertson. Ms Robertson accepts that such an arrangement was just one of a number of issues under discussion and consideration, and was progressed to the extent that new floor plans were prepared and measured, but no concluded agreement to that effect on that component, or indeed any component, of the whole package was ever arrived at.
- 3.9 Both parties claimed that documents and email existed to support their rival positions. None of that material had been disclosed in these proceedings and neither party had put in a comprehensive witness statement setting out their respective versions of events.
- 3.10 The issue here is a dispute between co-owners as to the what, if anything, was agreed between them as regards sharing the costs on the guttering works. That is not a landlord and tenant dispute which this tribunal has jurisdiction to determine.

4. Accordingly, the court file shall be returned to the court so that further directions can be given as the court considers to be appropriate.

Judge John Hewitt
23 June 2017

First-tier Tribunal (Property Chamber)

CAM/26UD/LSC/2017/0042

115 Ware Road, Hertford SG13 7EE

Robertson v Gilson

Notes for hearing on 22 June 2017

1. Parties

- 1.1 The parties wear different hats for different purposes and it is important that the distinction is clear at all times.
- 1.2 On 22 June 2001 Ms Gilson and Ms Robertson were registered at Land Registry as the joint proprietors of the freehold interest in the property and thus together constitute 'the landlord'.
- 1.3 Page 140 of the hearing file sets out the schedule of leases in the register of the freehold title. It only refers to five leases – there is no mention of the lease of flat 3. It may be that a page of the register has been omitted from the file. It appears there is no dispute that the lease of flat 3 is dated 21 July 1980. A copy is page 53.
- 1.4 At the time Ms Gilson and Ms Robertson acquired the freehold title all six leases had been granted. Also by that time Ms Gilson had acquired the leases of flats 2,3 and 4 and Ms Robertson had acquired the leases of flats 1, 5 and 6.
- 1.5 Thus Ms Gilson is the lessee/tenant of flats 2,3 and 4 and Ms Robertson is the lessee/tenant of flats 1, 5 and 6.
- 1.6 When each of the leases was granted a third party – called 'the maintenance trustee' - was joined as a party. The maintenance trustee undertook to perform the duties and provide the services set out in the Fourth Schedule. The maintenance trustee and was entitled to recover the costs of doing so from the tenants by way of a service charge. The lease of flat 1 named Joan Fathers as the maintenance trustee and that person was also named in the deed of variation of flat 4. George James Scarborough Taylor was named in the leases of flats 2,3 5 and 6.
- 1.7 It is assumed that when Ms Gilson and Ms Robertson acquired the freehold interest they came to an understanding firstly how decision making regarding management of the freehold interest would be arrived as between themselves as co-owners and landlord and who was to be appointed as maintenance trustee to fulfil the obligations of that role and collect in the service charges. No information on either matter has been provided to the tribunal. It may be noted that in the leases the maintenance trustee is defined to be "*the maintenance trustee for the time being of the maintenance fund hereinafter defined*"
- 1.8 The power to appoint a new maintenance trustee vests in the landlord by virtue of clause 7 (e) in most leases but the numbering in the lease of flat 1, which was granted a good while after the other leases, seems to have gone awry.
- 1.9 It may inferred or implied (for pragmatic reasons) that where a landlord has failed to formally appoint a new maintenance trustee the duties of that party fall to be

carried out by the landlord itself. If that is so, then in this case, that is Ms Gilson and Ms Robertson acting jointly as the landlord.

- 1.10 On that footing the costs properly incurred by the landlord in providing the services may be recouped by the landlord from the tenants in accordance with the percentage contributions set out in the respective leases.

2. The service charge regime set out in the leases

- 2.1 As regards payment of service charges to the maintenance trustee the leases (as varied – the lease of flat 4 was varied in 1985) provide:

The Table

1.	2.	3.	4.
Flat No.	Provision of services as per Fourth Schedule	Managing agents/surveyor's management fees	Insurance
1.	23%	23%	Fair and rateable proportion as the maintenance trustee may in his discretion think fit, such proportion to be calculated by the maintenance trustee's surveyor
2.	18%	25%	Ditto
3.	18%	Blank	Ditto
4.	12%	12%	Ditto
5.	18%	Blank	Ditto
6.	18%	18%	Ditto
Totals	107%	78%	

To summarise the parties' contributions as tenants to the Fourth Schedule services are as follows:

Flat No.	Ms Gilson	Ms Robertson
1.	23%	
2.	18%	
3.	18%	
4.	12%	
5.	18%	
6.	18%	
Totals	48%	59%

I have not listed the Column 3 percentages because it does not appear that any managing agents' costs or professional fees associated with the provision of services within the scope of clause 2(ii)(a) have been incurred by either of the parties.

- 2.2 The above are the **contractual** % contributions which each tenant is obliged to pay to the maintenance trustee in respect of the provision of services, management and the cost of insurance.
- 2.3 As a matter of landlord and tenant/contract law those % are fixed unless and until the landlord and the tenant agree to alter them, preferably by way of a deed of variation or, in certain (but limited circumstances), if they are varied by the tribunal upon an application being made pursuant to Part IV Landlord and Tenant Act 1987. (It may be noted that no such application is presently before this tribunal).
- 2.4 The service charge regime set out in clause 2(ii)(a) of the leases is fairly basic and may be summarised as follows:
1. The service charge year is 1 April to 31 March.
 2. Prior to the commencement of the service charge year the maintenance trustee (or his surveyor or managing agent) is to prepare a budget or estimate of the costs likely to be incurred in the ensuing year. Each tenant is obliged to pay their fixed % contribution in full on 31 March, that is to say on the day before the commencement of the service charge year.
 3. As soon as practicable after the end of the service charge year the maintenance trustee is to certify the actual expenditure incurred. Credit is given for the sum paid on account. If there is a balancing debit it may be demanded in the next demand for the on-account payment. If there is a balancing credit the tenant's account is credited and that credit will be reflected in the next demand for an on-account payment.
- 2.5 Where a landlord seeks to recover a service charge from a tenant the requirements of the lease must be complied with. That is to say there must be the certified estimate, a valid demand for the on-account sum claimed, a certified final account and a valid demand for the payment of a balancing debit. The demands issued must be compliant with all the regulations applicable to residential services charges.
- 2.6 It does not appear that the service charge regime as set out in the leases has been operated by the parties for a number of years. Instead a much less formal arrangement has been in place by mutual consent.
- 3. Further background**
- 3.1 It appears that over the years a number of modifications have been made to the flats and some have been reconfigured to quite an extent. Whether this has all been done by Ms Gilson and Ms Robertson acting in unison and agreement or whether some steps have been taken unilaterally is not clear to us, but that may not matter too much for present purposes.
- 3.2 The parties do appear to be agreed that the time is now ripe to either vary the existing leases or perhaps to surrender them and grant fresh leases for a longer term in a modern format. Certainly, if either party wished to sell one or more of their flats, a lease for a good number of years in modern form with an accurate lease plan would be more attractive to the market. The parties appear to have jointly instructed a solicitor to begin that process. However, they appear to be at odds on a number of points including what the service charge % contributions should be and

to what extent any new agreed % contributions are to be retrospective and, if so, for how long.

Evidently they need to resolve that issue in order that they can prepare a reconciliation of the various sums which each party claims to have incurred on 'services' or 'management' or 'insurance' and work out who owes what to whom.

4. The sum claimed in the court proceedings

4.1 The sum claimed in the court proceedings by Ms Robertson is £1,783, being 50% of the sum incurred on guttering. That sum is not claimed as a service charge, but is plainly claimed by one co-owner against the other co-owner pursuant to an alleged agreement or understanding between them as co-owners that they would share the cost of obligations as co-owners of the freehold on an equal basis.

4.2 As such this tribunal does not have jurisdiction to determine that dispute. It is not a dispute that raises issues within the ambit of section 27A Landlord and Tenant Act 1985.

4.3 If the court were to find that an agreement to share the costs of the guttering on a 50/50 basis was actually agreed between the parties or was to be inferred from past dealings, then it would be open to the court to find in favour of Ms Robertson that £1,783 is payable by Ms Gilson.

4.4 If the court were to conclude that the costs incurred on the guttering are to be treated as a service charge incurred by the landlord and if the question is of that sum what % percentage contribution is payable by Ms Gilson by way of a service charge in her capacity as tenant of flats 2,3 and 4 then, as matters stand now, and as a matter of contract law, the percentages set out in the Column 2 of the table in paragraph 2.1 apply; and they total 48%.

5. The way forward

5.1 It often happens that a landlord and tenant will make an informal agreement or arrive at an understanding that the formal arrangements set out in the lease will not be operated but a different arrangement will be mutually acceptable. A typical example is where a lease say, makes provision for the on-account payment for services is to be by two equal half-yearly instalments and the tenant requests to make monthly payments on account instead because that eases cash-flow and budgeting, and the landlord is prepared to agree to that, but no formal deed of variation is entered into.

5.2 Such an informal arrangement is lawful and enforceable so long as both parties agree. However, either party is entitled to give notice to terminate it and to revert instead to the strict contractual arrangements. A reasonable period of advance notice to revert to the strict lease terms is required. What is a reasonable period will depend upon the facts of each case. Where there is a fixed service charge year notice to revert back to contractual arrangements for the next ensuing service charge year may often be regarded as reasonable.

In the absence of agreement of both parties a retrospective reverting back is not possible.

- 5.3 It appears that Ms Gilson wishes not only to revert back to contractual position, but wishes to vary the contractual position and to apply that retrospectively. In the absence of mutual agreement that may not be a realistic outcome.
- 5.4 As regards varying the % payable by each flat, if the parties cannot reach agreement on what the new regime should be one of them can make an application to the tribunal pursuant to Part (IV) Landlord and Tenant Act 1987. Where the lease terms fail to make satisfactory provision there is a limited jurisdiction which enables the tribunal to vary the % in such a way as it thinks fit. It has a wide discretion. It appears that Ms Gilson favours apportionment on a floor area basis and Ms Robertson favours an equal sharing on a one sixth basis. We cannot predict what a future tribunal may determine if an application in proper form were ever to be made; much would depend on the evidence and arguments put forward. The tribunal may prefer one or other of the rival bases mentioned above, or it may impose something quite different. There are several different ways in which service charge costs can be apportioned amongst tenants; each has its pros and cons and each will invoke some level of unfairness to some extent or another to most if not all the tenants concerned.
- 5.5 What the parties must understand is that on an application under the 1987 Act the tribunal will not have jurisdiction to vary the leases as regards the length of the term, the imposition of a service charge regime in modern form or the substitution of new or revised lease plans.
- 5.6 Both parties appear to be of the view that the leases need to be varied in several quite significant respects and brought up to date. That is sensible, but this tribunal cannot do that for them. They have to do it for themselves. Ideally, they will be able to negotiate a way forward themselves, perhaps with the assistance of their jointly instructed solicitor or, if need be, with the assistance of an independent mediator who specialises in property.

John Hewitt

20.06.17