



**First-tier Tribunal
Property Chamber
(Residential Property)**

Case reference : **CAM/38UD/LSC/2015/0089**

Property : **11 Ipsden Court,
Cholsey,
Wallingford,
Oxon. OX10 9GD**

Applicant : **Colin MacGregor (self representing)**

Respondents : **Thomas Homes Ltd. and Cleaver Property
Management Ltd. (Boyes Turner LLP)**

Date of application : **16th October 2015**

Type of Application : **To determine reasonableness and
payability of service charges and
administration charges**

The Tribunal : **Bruce Edgington (lawyer chair)
David Brown FRICS**

DECISION

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1. If the service charges claimed from the Applicant include any subsidy of the 'social' housing, they are not reasonable and will have to be re-calculated to exclude any such subsidy before they become payable.
2. Any subsequent demand for service charges must be accompanied by a summary of the rights and obligations of tenants pursuant to section 21B of the **Landlord and Tenant Act 1985** ("the 1985 Act")
3. No order as to costs save that the Tribunal makes an order pursuant to section 20C of the 1985 Act preventing the Respondents from claiming any amount for representation within these proceedings as part of any future service charge.

Reasons

Introduction

4. The property is a 4 bedroom duplex flat in a renovated former Victorian asylum known as Fair Mile Hospital. The estate consists of 130 dwellings containing 1 to 4 bedrooms. There is a large communal hall and extensive grounds some of which must be kept open to the public in accordance with an

agreement entered into on the 29th July 2010 pursuant to section 106 of the Town and Country Planning Act 1990 covering this estate and other land totalling 354 residential units (“the section 106 agreement”).

5. 39 out of the 130 dwellings were leased to SOHA Housing Ltd. which were designated as what is known as ‘social’ housing and the essence of this dispute is the fact that service charges for the social housing dwellings are ‘capped’ at £522 per annum for the first year and then will only increase in accordance with the Retail Prices Index or its equivalent (“RPI”). This means, in effect, that if £522 is not a fair proportion and if the service charges actually increase by more than the RPI, then scheme anticipated by the section 106 agreement means that the private leaseholders have to subsidise the tenants of the social housing by making up the shortfall.
6. The Application form identifies the Respondents named above plus Fair Mile Management Company as Respondents. Fair Mile Management Company Ltd. is actually a company limited by guarantee but is not a party to the lease of the property and was not made a Respondent. It seems to have been set up by the first named Respondent to assist with the collection of monies and, ultimately, to form a sort of residents’ association.
7. It transpires that Cleaver Property Management Ltd. is simply the managing agent acting on behalf of the landlord and Cholsey Meadows Management Company Ltd. (“Cholsey”). Cholsey is a party to the lease. The management arrangements in the lease are that the landlord, Thomas Homes Ltd. will manage what is called the ‘Building Common Parts’ and Cholsey will manage the ‘Estate Common Parts’.
8. The solicitors acting for the Respondents have said that the managing agents should not be party to the application. In fact, Cholsey should have been, as they have a contractual responsibility to the Applicant to undertake management. In view of the decision made in this case, the Tribunal has decided not to change the parties as the time taken in obtaining further representations would be disproportionate.
9. The Tribunal made a directions order on the 30th October 2015 timetabling the case to a determination. As the argument seemed to be based only on contractual matters the Tribunal said that it would be content for the case to be determined on the basis of the papers and written representations. The appropriate notice was given with a clear proviso that if a party wanted an oral hearing then one would be arranged. For the same reason, the Tribunal indicated that it would not need to inspect the property but would consider any request for an inspection. No application has been made for either an inspection or an oral hearing.
10. The directions order stated that a bundle of documents had to be filed and the Applicant is to be commended for the very full and comprehensive bundle supplied.

The Lease

11. This dispute relates to the contractual relationship between the parties. To

say that the lease is complex is an understatement. It runs to some 47 pages of single spaced print plus a number of complex plans. It is all very well for the Respondents' solicitors to say that the Applicant had legal advice when he bought. That may be the case but quite how an ordinary member of the public is to retain legal advice about what this lease means over the years is simply incomprehensible.

12. The lease is dated 16th May 2013 and is for a term of 999 years from 1st October 2011 with a ground rent of £100 per annum which increases every 20 years in accordance with RPI. The landlord and the management company between them maintain the buildings and the grounds and collect a service charge from the lessees. In this case the annual proportions are 6% of the Estate common parts, 10% of the Building common parts and similar percentages for the reserve funds in each category. Even the landlord accepts that there was an error in the lease because 10% is not the correct proportion for Building common parts as 'blocks' seem to have been confused with 'buildings' which are not the same thing.
13. There is provision in paragraph 2 of Schedule 7 to the effect that if there is any re-planning of the layout of the development or the buildings then these percentages can be recalculated 'on an equitable basis'. There is no suggestion by either party that there has been such re-planning.
14. According to the landlord at page A126 in the bundle, the Applicant has actually been charged 9.52% rather than 10%. As to the general picture, the landlord says, at page A111, that as to the overall service charge bill, the capped contributions received in respect of the 'social' housing units are deducted and the remainder of the bill is shared between the remaining units. The figures contained in the accounts and demands would certainly indicate that the private non 'social' housing tenants are subsidising the 'social' housing tenants.
15. A great deal has been said about the section 106 agreement in the papers. The lease makes very little reference to this. Such agreement is defined in the definitions section of the lease but it looks as though the only other mention of the agreement itself is in paragraph 31 of the tenant's covenants set out in Schedule 8, Part A. That simply says that the tenant must comply with the aims and objectives of the Community Trust as set out in the section 106 agreement. The Community Trust is in the agreement but has nothing to do with the tenant's proportion of service charges.

The Law

16. Section 27A of the **Landlord and Tenant Act 1985** ("1985 Act") says that an application can be made to this Tribunal for a determination as to whether a service charge is payable. No such application can be made if a service charge has been 'agreed or admitted by the tenant'. There are similar provisions relating to administration charges as defined by paragraph 1 of Schedule 11 of the **Commonhold and Leasehold Reform Act 2002**.

Discussion

17. It should be made clear that the Applicant has said from the outset that he is not challenging the reasonableness of any particular item of service charge in terms of the reasonableness of the work done or charge made. He does mention that some services supplied to the different 'category' of tenant are different but there is no real detail or suggested solution.
18. There is a further ancillary point in that 3 properties which were part of the original 'social' housing allocation were sold on long leases apparently because they were 4 bedroom properties which SOHA Housing Ltd. had difficulty in letting. The Applicant makes the point that these have the same 'capped' rent provisions as in the remaining 'social' housing properties and this is unfair in itself because the 'cap' should have been removed on sale.
19. The question for this Tribunal to determine is really the very narrow question as to whether the Applicant is contractually bound by the combined effects of the lease and the section 106 agreement to accept the subsidization.
20. For perfectly understandable reasons, the **Applicant's legal position** has not been fully explored in his representations. He just feels that it is unfair that he should subsidize other tenants. In his application, he says that he only found out about this situation in a meeting of leaseholders called by the landlord on the 28th May 2015. The Tribunal will therefore look at the legal position from his point of view.
21. There is no doubt in the minds of the members of this Tribunal that the lease is badly drawn. Despite the representations of the Respondents' solicitors, a tenant is not automatically bound by the terms of a section 106 agreement unless the terms are specifically said to actually affect him or her. It could be said, and is said on behalf of the landlord, that the tenants had constructive, if not actual, notice of what is in the agreement because it is a public document and the lease makes reference to it. Nevertheless, if there is to be a contractual obligation that the tenant is to subsidize the service charges of other tenants, there needs to be a covenant to that effect. There is none.
22. The Tribunal is conscious of the *contra proferentem* rule which was devised many years ago to assist courts and Tribunals in matters of interpretation. It is not, of course, the only rule of interpretation. It translates from the Latin literally to mean "against (*contra*) the one bringing forth (the *proferens*)".
23. The principle derives from the court's inherent dislike of what may be described as 'take it or leave it' contracts such as residential leases which are the product of bargaining between parties in unfair or uneven positions. To mitigate this perceived unfairness, this doctrine was devised to give the benefit of any doubt to the party upon whom the contract was 'foisted'.
24. In the case of **Granada Theatres Ltd v. Freehold Investments (Leytonstone) Ltd** [1958] 1 WLR 845, Mr. Justice Vaisey said, at page 851, that "a lease is normally liable to be construed *contra proferentem*, that is to say, against the lessor by whom it was granted". Thus, even if there was an ambiguity in the lease, there is a case for saying that this should be resolved in

favour of the Applicant tenant. In fact, the Tribunal does not think that there is any ambiguity.

25. With the greatest respect to the solicitors involved, the **Respondents' legal position** is not very helpfully set out. They just say, in effect, that because the section 106 agreement says that the 'social' housing properties have their service charges 'capped' by the agreement, this is binding on the Applicant because he had legal advice and notice of what was in such agreement. What they do not point to is any provision in the lease itself which amounts to a covenant on the part of the Applicant that he must pay more than the contractual percentage of the service charges as set out in the lease.

Conclusions

26. The answer to this problem lies in the need for the Tribunal to consider how the contractual position should be interpreted. Would a court imply a term into the lease of this property – and all the other non 'social' housing leases – to the effect that the tenant is bound by the terms of the section 106 agreement to the extent that any shortfall in the total cost of maintaining and insuring the estate caused by the capping provisions should be met by the other tenants?
27. The short answer to that question is that the terms of the leases are clear and unambiguous. Perhaps the Applicant's solicitors could have raised a query before the lease was entered into by asking who was to make up any shortfall in the service charges of the 'social' housing. After all, with a ground rent of only £100 per annum, where did they suppose the shortfall was going to come from? These leases are for 999 years. Did they really think that the landlord and the management company would be paying the shortfall for all this time?
28. Perhaps the answer to that question is that with only a limited obligation on the part of the Applicant to comply with the section 106 agreement, there was no real need to look at the remainder of the document in depth in order to try to understand its implications. Did it not occur to the solicitors for the landlord and the management company that in due course, capping the service charge provisions for a significant section of the leases without providing for someone to take up any shortfall, would mean that such landlord and management company could become insolvent and go into liquidation? Who maintains the estate when this happens, and at whose cost?
29. In the circumstances, the Tribunal concludes that the terms of the lease of the property are clear and that there is no express or implied term to the effect that the Applicant shall subsidise the 'social' housing tenants. This was presumably a mistake in the drafting of the lease. As the Respondents' solicitors have said, this is not an application to vary the leases. Even if it were such an application by the landlord and the management company, it is by no means certain that any variation to provide for subsidy would be approved. It could be said that this lease does make adequate provision for the payment of service charges.
30. The Respondents' solicitors have said that service charges claimed have been

the percentages stated above but with the starting point being the balance over and above the capped amounts payable by the 'social' housing properties. It is therefore seems clear that the Applicant's share of the service charges is more than the proportion of the total costs as set out in the lease. If that is right, then the claims will have to be re-calculated. The second paragraph of the order is made for completeness because the service charge demands seen by the Tribunal do not contain the statutory information required. It may be that notices with the statutory information were also served and no determination is made in respect thereof.

31. As a final point, it is clear from the policy advice on these arrangements submitted by the parties, that the local authority in this case did not follow such advice. Although the good intentions are clear, the fact of the matter is that this arrangement does not appear to have been thought through properly. The intention was to cap service charges for one section of the tenants and make the other tenants pay the shortfall. The result of that is likely to be that as the years go by, 91 of the 130 tenants on this estate will become more and more resentful of the other 39 which is hardly a recipe for a coherent and successful community. It would certainly be sensible if the Respondents could try to persuade South Oxfordshire Council to be more realistic and change the terms of the agreement on this issue even though it could not realistically be a retrospective change.

Costs

32. The Applicant seeks an order preventing the Respondents from claiming their costs of representation as part of a future service charge. It seems clear that such application is made on behalf of all the tenants. The Respondents say that such an order should not be made. The Tribunal must determine whether it would be just and equitable for the landlord not to be able to recover the costs of representation which are clearly provided for in the lease. In view of the determination made in this case it is deemed just and equitable for such an order to be made as requested.

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Bruce Edgington
Regional Judge
25th January 2016

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.