



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

Case Reference : **CHI/29UB/LSC/2018/0079**

Property : **82-92 (Even Only) De Montfort Park
Imperial Way, Ashford,
Kent TN23 5HU**

Applicant : **De Montfort Park 2
Management Company Limited**

Representative : **HML Group**

Respondent : **(1)Mr Huynh (2)Ms James
(3)Ms Garside (4)Mr Da Silva
(5)Dr Syed and Dr Syeda (6)Mr Fuller**

Type of Application : **s.27A '85 Act**

Tribunal Members : **Judge D Dovar
Mr R Athow FRICS MIRPM
Mr P Gammon MBE**

Date and venue of Hearing : **13th March 2019, Ashford**

Date of Decision : **18th March 2019**

DECISION

Introduction

1. This is an application under s.27A of the Landlord and Tenant Act 1985 for the determination of the payability of service charges in respect of the Property for the years ending 2012 to 2018.
2. The Applicant is the Management Company and a party under the long leases of the Property. The Respondents are the 6 long leaseholders of the flats in the Property. The Applicant company has, as its members, the long leaseholders. The Tribunal has not seen the membership list, nor the articles of association, but notes from the terms of the representative lease provided, that all the leaseholders are to be members of the Applicant.
3. None of the Respondents have filed any submissions or evidence in accordance with directions that had been given by the Tribunal. Ms Garside of flat 90 attended both the case management hearing and the final hearing, but did not make any submissions.

Inspection and description

4. The Tribunal inspected the Property and the surrounding area on the morning of the hearing.
5. The Property, which comprises 6 flats, is situated on the large Singleton Village Estate on the western outskirts of Ashford. The estate was developed about 15 years ago and comprises mainly houses, but with a few blocks of flats, some shops, a pub and a village hall. The Property is at the junction of Imperial Way to the West and Deyley Way to the North. It is understood that these roads have been adopted by the Highways Authority.
6. The block is set towards the outskirts of the village and is on three floors. There is a communal entrance door serving the four upper flats whilst the two ground floor flats have their own access. Construction is of traditional design with brick elevations and tiled roof. A small area of garden surrounds the block.

7. To the South of the block is a private roadway ('the Accessway') which leads to 9 houses, 3 garages and 17 parking spaces. Each parking space is demised to either a flat or nearby house. There are a further 3 houses fronting onto Imperial Way which have pedestrian access to the Accessway and it is understood that they each have a right to one of the car parking spaces and/or garages.

Issue for determination

8. For a number of years, the total cost of services for the Accessway has been divided equally by the Applicant amongst the flats and houses on the basis that each contributes $1/17^{\text{th}}$. This cost, called an Amenity Charge by the Applicant, has included not just the direct cost of any works or services required, but also the administration costs of the Applicant company, including director and officer insurance and company secretarial fees. The Applicant charges the Respondents solely a separate service charge under the terms of their leases for matters unrelated to the Accessway.
9. The Amenity Charge has been levied in this manner for a number of years. More recently, last year, one of the house owners objected to paying. They asserted that they were not members of the Applicant company and had no obligation to pay it any sums. In light of that, the Applicant took advice as a result of which it is now of the view that the house owners have no obligation to contribute. On that basis it now considers that the Respondents should pay $1/6^{\text{th}}$ of the total Amenity costs, rather than $1/17^{\text{th}}$ as the pool of contributors is much smaller than they originally considered. They also seek to backdate the adjustment to 2012; hence the scope of the present application. The Tribunal was told that this would amount to a surcharge to each Respondent of around £2,500.

Applicant's submissions

10. The Applicant's contention was that as various charges, which had been divided amongst houses and flats equally, were not in fact payable by the house owners, the flat owners should each bear a greater share of the "Amenity Charges" It was said by the Applicant that this refers to items

incurred under the heading “Common Access” as defined in the lease and transfers (for which see below). These show as a separate account from the Block Service Charge within the year-end accounts.

11. The specific items for which they sought a determination that the Respondent's share was to be increased from 1/17th to 1/6th were:
 - a. Director and Officers Insurance in respect of the officers of the Applicant Company;
 - b. Public liability insurance for the Common Accessway;
 - c. Gardening ;
 - d. Drains, gutters and pipes;
 - e. Various administrative costs of the Applicant: being, postage, accountancy, meetings and inspections, management fee, company secretarial fees, document storage, and bank charges; and
 - f. A general reserve.
12. Of those items, all, save for directors and officers insurance and company secretarial fees related solely to the Accessway. The other costs were company costs which were incurred generally and divided amongst the 17 unit holders.

Lease terms

13. As with many applications is it instructive to consider the terms of the lease in order to understand the Respondents' liability to pay a service charge and the breadth of that liability. The Tribunal did not consider that it was simply a matter of subtracting a contribution from the house owners and adding a correlative amount to the contribution due from the flat owners. The underlying question is what is the Respondents' liability to pay the costs incurred by the Applicant in fulfilling its obligations in respect of the Accessway.

14. The Tribunal has been provided with a copy of the lease of Flat 5, De Montford Park Ashford, which is taken as representative of all the leasehold flats on the estate and more particularly in the Property.
15. The lease is dated 20th December 2004 and is for a term of 125 years from 1st July 2004. The parties are: (1) Bryant Homes Southern Limited ('the Landlord'); (2) De Montfort Park (Ashford – Phase 2) Management Company Limited ('the Management Company') [the Applicant]; (3) the named leaseholder ('the Tenant').
16. There is a plan to the lease, Plan 2, which is referred to in the various definitions below. This shows a large area coloured green area which includes both the garden and amenity area immediately adjacent to the Property as well as the Accessway running to the south. The latter area, as well as being coloured green, is also cross hatched.
17. What is clear from the lease terms is that there are broadly two service charge cost items: the Block Service Charge and the Common Access Charge. In order to determine the extent of the Respondents' liability to contribute to the Amenity Charge, it is necessary to consider the interplay between these two broad service charge headings.

The Common Access Charge

18. Clause 1 provides a number of definitions, including:
 - a. 'Common Accesses': the footpaths and accesses intended to serve more than one property shown cross hatched and coloured green on Plan 2;
 - b. 'Common Access Charge': a fair proportion as stipulated by the Landlord in its reasonable discretion of the cost incurred by the Landlord [sic]¹ charged to the Landlord in maintaining and renewing the Common Accesses.

¹ Presumably, and as a matter of corrective construction, the word 'or' has been omitted

19. By clause 2.4.5 the demise was subject to the Tenant paying to the Landlord ‘on demand by way of further or additional rent from time to time the Common Access Charge’. By Clause 3.1 the Tenant covenant to pay the rent to the Landlord.
20. Therefore as the Common Access Charge is reserved as rent, the obligation is on the Tenant to pay the Landlord the sum demanded from time to time in respect of costs that it incurs or is charged in relation to the Accessway.
21. It is notable that there is no reference to the Applicant in terms of any services to be performed in respect of the Accessway or in respect of any right to collect any sum for any services performed or costs incurred in relation to the Accessway.

Block Service Charge

22. The table of particulars of the lease specifies the Service Charge ‘Proportion’ payable by the Tenant; in this case it is 16.7%; i.e. 1/6th.
23. Clause 1 provides the following definitions:
 - a. ‘the Block’: all that property area shown coloured green on Plan 2 and the Building;
 - b. ‘the Block Charge’: the proportion of the Block Service Charge specified as the Proportion from time to time;
 - c. ‘The Block Service Charge’: the aggregate of the costs fees expenses and outgoings properly incurred by the Landlord/Management Company relating to the services referred to in Part 2 of Schedule 2;
 - d. ‘the Building’: the building of which the flat forms part (save for the other flats);

- e. ‘Common Parts’: all part or areas of the Block not let, including:
 - (a) any open spaces garden refuse areas and accesses ... (d) all main entrances paths landings passages roads pavements ...’
 - f. ‘the Service Charge’: the service charge calculated and payable in accordance with Schedule 2;
 - g. ‘Services’: the services referred to in Part 2 of Schedule 2;
24. By clause 4.9 the Tenant covenants with both the Landlord and the Management Company to pay the Service Charge ‘to the Landlord or as the Landlord shall direct’ in the manner set out in Schedule 2.
25. By clause 5, the Management Company covenants with both the Tenant and the Landlord to provide the services set out in Schedule 2.
26. Part 1 of Schedule 2 sets out the service charge mechanism. It provides for an advance payment to be made ‘to the Landlord’ on account of the Block Charge. That is ‘such sum as the Landlord shall consider fair and reasonable for each subsequent Financial Year as the Landlord or Management Company (as the case may be) from time to time specifies.’ There is then a balancing payment as soon as practicable after the year end.
27. Part 2 of Schedule 2, sets out the services, the cost of which, can be recovered through the service charge. They are relatively wide ranging and expressly include:
- a. ‘The maintenance repair renewal ... of the Common Parts’ (para 1);
 - b. ‘All refuse disposal costs relating to the Common Parts’ (para 9);
 - c. ‘The cost of employment of any staff reasonably suitable to provide and supervise the Services (whether or not such staff are employed directly by the Landlord) for the Common Parts ...’ (para 11);

- d. ‘The amount which the Landlord shall properly be required to pay as a contribution towards the expense of making repairing maintaining testing rebuilding and cleaning anything used by the Common Parts in common with other adjoining or neighbouring premises including ... roads ... pavements ...’ (para 14)
 - e. ‘Any other costs and expenses properly and reasonably incurred by the Landlord and their surveyors or Managing Agents in connection with the general supervision management provision of other services and amenities of any kind ... not otherwise specifically mentioned in this part ...’ (para 16);
 - f. ‘The proper fees and expenses of the Landlord’s surveyors Managing Agents accountants or other professional advisers incurred in connection with the management of the Block ... together with (where the Landlord does not retain managing agents for the Block) a sum equal to 10% of the Block Charge...’ (para 19).
28. In essence, this provides the service charge regime in respect of the Property. The Applicant, as Management Company, has covenanted to undertake the services set out in Part 2 of Schedule 2. Whilst ostensibly the service charge is payable to the Landlord, there is power to direct its payment elsewhere. In this case the Tribunal is prepared to assume that it has been directed to be paid to the Management Company. That is the natural direction for payment given that the Management Company needs the funds in order to carry out the works.

Transfer of freehold houses

29. The Tribunal has also been provided with the transfer of 14 De Montford Park; which it is understood is representative of the terms of the transfer of the freehold for each of the 11 houses. That is a transfer by Bryant Homes Southern Limited dated 15th June 2005, by which the transferee has covenanted with the transferor to contribute ‘a fair proportion of the cost of inspecting maintaining repairing and renewing ... the Common

Accesses'. The Common Accesses are defined as 'all entrances driveways footpaths forecourts or accesses intended to serve more than one property shown cross hatched on the Plan'.

30. The plan is the same as that appended to the leases, in particular the cross hatched area shows the same Common Accesses.

Construction of lease

31. The crucial question is whether the services that the Management Company has undertaken to carry out and in respect of which it can, through the Landlord, recover a service charge, include services to the Accessway.
32. The Accessway clearly falls within the Common Access Charge. However, that does not involve the Applicant.
33. Further, it is possible that given the reference to 'accesses' in the definition of Common Parts in clause 1 and the use of that term in paragraph 1 of Part 2 of the Second Schedule, that it is also part of the services that the Applicant can provide and recover a service charge for.
34. That would potentially provide two avenues of recovering the same amount, either through the Block Service Charge or through the Common Access Charge. If the former then the apportionment is fixed at 1/6th, whereas if the latter it is more flexible, being a fair proportion.
35. This gives rise to some ambiguity; why would the lease provide for the costs of the same service to be recoverable in two different ways each with their own basis of apportionment?
36. The Applicant stated that the development was about 15 years old, which ties in with the date of the lease. From the lease plan, the development was laid out prior to the grant. In respect of the Accessway, it was therefore envisaged by the terms of the lease that others (in particular the freehold houses) would be using that area and no doubt contributing to the cost of maintaining the same. It would therefore follow that restricting

the contribution to 1/6th from the Respondents would not account for the contribution provided for by the freehold houses. That is a good indication that the Block Service Charge regime does not include the cost of any works or services to the Accessway.

37. That construction is supported by another part of the lease. The rights granted to the tenant under paragraph 2 of Part 2 of Schedule 1 include 'the right in common with the Landlord ... to use ... the Common Parts and the Common Accesses ... the Landlord shall have the right temporarily to close or divert any of the accessways or the Common Parts or the Common Accesses ...'
38. If the Common Parts were, throughout the lease, intended to include the Common Accesses, then there would be no need to make reference to the latter in paragraph 2.
39. Where contributions to the cost of maintenance of the Accessway was, in part, to be provided by the houses, there should be some mechanism by which the payment of that contribution is secured. If the Applicant carried out that work, there is no direct mechanism for it to demand payment from the house owners; certainly not under the covenants in the transfer documents. That is another factor which supports the construction that the Common Access Charge is the relevant provision for works to the Accessway and not the Block Service Charge.
40. Accordingly the Tribunal does not consider that the Applicant is either obligated to carry out any services to the Accessway or is able to charge a service charge in respect of any services provided: whether a Block Service Charge, Common Access Charge or Amenity Charge.
41. As the leases do not permit the Applicant to recover the costs of services to the Accessway, none of the costs claimed are recoverable from the Respondents, save potentially the directors and officers insurance and the company secretarial fee. As set out above, those items were not incurred solely in relation to the Accessway.

42. The Applicant conceded at the hearing that if this construction was correct, then all bar these two sums were not recoverably by the Applicant.
43. In terms of the remaining two items, the Applicant relied on paragraphs 16 and 19 of Part 2 of the Second Schedule as permitting recovery of what are essentially the company costs of the Applicant. The Tribunal did not consider that they were covered by either paragraph. In respect of both paragraphs, they were not a cost of any of the entities referred (being, the Landlord, their Surveyors, or their Managing Agents, accountants or other professional advisers), they were a cost of the Applicant Management Company. Further, paragraph 14 was in relation to the costs of other, non-identified services or amenities and company costs do not fall within that category.

Section 20B

44. Even if the Applicant were to be able to recover these sums the Respondents liability should be 1/6th rather than 1/17th, the Applicant would run into difficulty in recovering historic charges given the 18 month time limit on recovery of service charges imposed by s.20B of the Landlord and Tenant Act 1985. The Applicant raised this issue in their statement of case, but did not provide any answer to it.
45. The additional charges claimed, going back to 2012, from the Respondents had not been demanded and for each of the years up to and including 2016, the accounts had been reconciled and there was no surplus carried over. The result being that in order to claim those sums, a fresh demand would have to be raised which would fall foul of s.20B.
46. The same may not be the case from 2017 onwards as the Tribunal were informed that the year end 2017 accounts have not yet been issued and that a s.20B notice had been served. Given the determination on the underlying liability to pay, the Tribunal does not need to consider whether this would allow recovery.

Conclusion

47. Accordingly the Tribunal does not consider that the additional sums sought by the Applicant are payable by the Respondents. In any event, certainly any sum up to the year end 2016 would have been precluded by s.20B.
48. In determining the application in this manner, the Tribunal is conscious that it undermines the historical Amenity Charges that have been levied; however, it has not given either party any opportunity to address it on any issues of waiver, estoppel or change of position.
49. In light of the above, the Tribunal makes an order under s.20C of the Landlord and Tenant Act 1985 preventing the Applicant from recovering any of the costs of this application through the service charge. Further, the Tribunal does not accede to the request by the Applicant for reimbursement of the application and hearing fee.

Judge D Dovar

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.