



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

Case Reference : **LON/00BG/LSC/2020/0222
CVP REMOTE**

Property : **Flats at Free Trade Wharf, 340 the
Highway, London E1W 3ES**

Applicant : **Free Trade Wharf Management
Company Limited**

Representatives : **Mr Niraj Modha of Counsel**

Respondent : **The Leaseholders Phase 1 Flats and The
Listed Building Flats (as
set out in the schedule to the
application)**

Representative : **Mr Jonathan Upton of Counsel**

Type of Application : **For the determination of the liability to
pay service charges (s.27A Landlord and
Tenant Act 1985)**

Tribunal Members : **Professor Robert Abbey
Mr Kevin Ridgeway MRICS**

**Date and venue of
Hearing** : **5 August 2021 by online video hearing**

Date of Decision : **9 August 2021**

DECISION

Decisions of the tribunal

- (1) The tribunal determines that: -
- (2) The respondents are liable under the terms of the leases of the Listed Building Flats for the recovery of the cost of works which expressly include the areas comprised within the jetty lease as hereinafter defined as service charges.

The application

1. The applicant seeks a determination under section 27A of the Landlord and Tenant Act 1985 as to whether service charges are payable in respect of urgent works said to be necessary to a jetty which sits in the River Thames adjoining the Free Trade Wharf development. That development comprises: (i) the Phase I Flats at 1-169 Free Trade Wharf, (“phase 1 flats”) and (ii) the Listed Building Flats at 1-41 Listed Building, Free Trade Wharf, (“LB”). The applicant is currently in the process of determining the scope of necessary works and associated costs, and will consult with leaseholders once the scope of works is determined.
2. The relevant legal provisions are set out in the Appendix to this decision. Additionally, rights of appeal are set out below in an annex to this decision

The hearing

3. The applicant was represented by Mr Modha of Counsel and two of the respondents were represented by Mr Upton also of Counsel.
4. The tribunal did not inspect the property as it considered the documentation and information before it in the trial bundle enabled the tribunal to proceed with this determination and also because of the restrictions and regulations arising out of the Covid-19 pandemic.
5. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was coded as CVPREMOTE - use for a hearing that is held entirely on the Ministry of Justice CVP platform with all participants joining from outside the court. A face-to-face hearing was not held because it was not possible due to the COVID-19 pandemic restrictions and regulations and because all issues could be determined in a remote hearing. The documents that were referred to were in one bundle of many pages, the contents of which we have recorded and which were accessible by all the parties. Therefore, the tribunal had before it an electronic/digital trial bundle of documents prepared by the applicant and the respondent, in

accordance with previous directions. Legal submission/skeleton arguments were also made available to the tribunal.

The background and the issues

6. The property which is the subject of this application comprises a development of 208 residential flats. This is made up of an original development of 169 flats being the phase 1 flats and 39 flats, the LB flats, and a leisure centre that were formed from two adjoining listed warehouse buildings. The phase 1 leases are all in a similar format. The LB leases are not all the same, two are in much the same format as the phase 1 leases while the remaining 37 are similar to each other but are different to the phase 1 leases. In addition to the 208 flats there are surrounding areas, a footpath adjacent to the River Thames along with a jetty and wharf (“the jetty”) which comprise the Free Trade Wharf.
7. The freeholder of the property is the applicant. The applicant is also the leasehold owner of Phase 1 and the leisure centre at ground and first floor level pursuant to a 999-year lease dated 28 September 2005, (“the headlease”). Furthermore, the applicant also leases the river bed upon which the jetty is located pursuant to the terms of a lease with the Port of London Authority and dated 25 February 1987. This is the jetty lease. The respondents are of course the lessees of the phase 1 leases and the LB leases. All of the leases were originally granted by the developer of the property, Regalian Homes Limited.
8. The dispute before the Tribunal relates to the jetty structures. The jetty includes Newcastle jetty and Charrington wharf. The jetty structures are made of timber decking, timber piles, concrete plinths, concrete platforms and railings. The structures are embedded into the foreshore of the River Thames.
9. The problem is that the jetty is in significant disrepair. The structures are affected by rot and decay. Because of this the structures are considered unsafe and consequently access to the jetty is currently restricted. As a result, the applicant intends to, after further investigations and surveys, remove or partially demolish the jetty. The cost of the proposed works will be very significant: they may exceed £2 million in total. The question of who amongst all of the lessees of the property will have to pay for these works is at the core of the dispute. This is because 37 of the 39 LB lessees say that they are not required under their lease terms to pay for these jetty works. At this point in time the reasonableness of the service charges is not in dispute, the payability is.
10. For the purposes of this dispute and in the context of the two types of lease, it has been understood that the Phase I Lessees were liable to contribute towards the cost of works to the Jetty (by reason of the extensive definition of “the Estate” in the leases of flats in the Phase I

Building and the plan that clearly show the inclusion of the jetty and wharf).

Summary of the applicant’s argument

11. The applicant takes the view that the respondents are contractually bound to pay service charges in accordance with the terms of the 37 LB leases. The Applicant says that the jetty has been incorporated into the estate and this incorporation occurred many years ago since the jetty has been treated as an estate service charge item for many years. Furthermore, the two LB leases that resemble the phase 1 leases have express rights over the jetty (in common with the phase 1 lessees). Additionally, the applicant says that the jetty lease was taken on by the applicant’s predecessor so that the lessees of the property in total could use the jetty as “*an amenity area in connection with their residential and commercial use of the property*”.
12. Historically it should be noted that at the time of the phase 1 leases there was no headlease. Since the LB leases post-date the headlease there was no need to include an express reference to the jetty lease as was done previously in the phase 1 leases. In essence the applicant says that on a proper construction of the leases the applicant is entitled to require all 208 tenants to contribute towards the costs of dealing with the jetty that is presently in disrepair.

Summary of the respondent’s argument

13. The respondents say that first and foremost the jetty is not included in the lease plan attached to the listed building lease. As such this is a significant indication that there was no intention to impose an obligation on the lessees to pay towards the upkeep of the jetty. The applicant’s argument that the Jetty is a communal area or an area provided for common or general use by some or all of LB Lessees (and is, therefore, included in the Common Parts) adds nothing because the Jetty is not within the Estate and any such areas cannot, therefore, be Common Parts.
14. The LB Lessees do not have an express right to use and enjoy the Jetty. The Jetty is accessible by members of the public from the public footpath known as the Thames Footpath. To the extent that the LB Lessees have used and enjoyed the Jetty, they have done so as members of the public and not pursuant to any right they have as a lessee. The Jetty is not, therefore, a communal area or an area provided for common or general use by some or all of LB Lessees. It is the respondent’s case that the definition of the Common Parts includes a comprehensive and detailed list of all areas, facilities and equipment that are included. There is no reference to the Jetty. The only conceivable explanation is that the Jetty was intentionally omitted by the draftsman.

15. The respondent also rejects the assertion that the jetty has been incorporated into the estate. The respondent says there is no evidence to support this assertion. In essence the respondent says there is no legal obligation upon the 37 LB lessees to pay towards the cost of repairing the jetty.

Decision

16. The tribunal is required to consider which argument they prefer in their interpretation of the lease and service charge provisions and the payability of service charges for repairs to the jetty. The tribunal therefore sought precedent guidance to support their decision-making process. The recent Supreme Court case of *Arnold v Britton and Others* [2015] UKSC 36 is extremely helpful in this regard. This case was about judicial interpretation of contractual provisions analogous to the dispute before the tribunal. The court held-

“that the interpretation of a contractual provision, including one as to service charges, involved identifying what the parties had meant through the eyes of a reasonable reader, and, save in a very unusual case, that meaning was most obviously to be gleaned from the language of the provision; that, although the less clear the relevant words were, the more the court could properly depart from their natural meaning, it was not to embark on an exercise of searching for drafting infelicities in order to facilitate departure from the natural meaning; that commercial common sense was relevant only to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties as at the date on which the contract was made....it was not the function of a court to relieve a party from the consequences of imprudence or poor advice”.

17. Accordingly, the tribunal turned to the lease to try to identify what the parties had meant through the eyes of a reasonable reader.
18. Evidence was provided that historically jetty repairs were carried out and paid for as a service charge by all the lessees. Anthony Brain Hymer, a Director of Burlington Estates who manage the property for the applicant confirmed that *“the Jetty has historically been treated as an estate item of the whole Estate (i.e., both the Phase 1 and the Listed Building areas).”* His evidence is important as it show that works were carried out to the jetty and were considered service charge items for all the tenants over a substantial period of time.
19. He said in his witness statement that -

6. *“Peter Maclean, who was director of the Applicant company during the period 21.11.1994 to 24.9.2013 has confirmed to me that expenditure on the Jetty, such as replacement of the decking of the Jetty every couple of years and costs of the fencing installed when the Jetty became unsafe, was allocated by the Applicant as an estate service charge item to all leaseholders of the Estate.*

7. *Mr Maclean has also been able to locate further supporting information from historic certified accounts and emails he had with two accountants employed by the Applicant. He has summarised this information in the Jetty expenditure summary document attached at pages [1-3]. This shows:*

7.1 • *2010/11: £1,500.00 expenditure on the Jetty, which was charged to the Estate fund and reported in the certified Accounts.*

7.2 • *2011/12: £1,311.36 expenditure on the Jetty, was charged to the Estate fund, and reported in the certified Accounts.*

7.3 • *2013/14: £1,834.04 was paid for the purchase of the fencing around the Jetty. Derek Snowball, who was the Applicant’s director between 05.12.2013 and 16.05.2014, has confirmed directly to me that this cost was also charged to the whole Estate.”*

As will be noted from this evidence the jetty was treated as a service charge item for all the flats in the property for well over a decade. Mr Derek Snowball of 129 Free Trade Wharf, 340 The Highway, London E1W 3EU also provided a witness statement. He was a former Director of Free Trade Wharf Management Company Limited and is a leaseholder of a Phase1 flat and shareholder of the applicant. His evidence is very instructive and significant and is as follows: -

The applicant “acquired the Head Lease on 28th September 1995. The contents of that Head Lease are essential in demonstrating that the Landlord of The Listed Building is obliged to pay 23.96% of the Total Estate Charge which includes The Newcastle Jetty and adjacent wharves. Note the following: -

- 1. Clause 7 the percentage contribution towards the Estate Expenditure by the Listed Building Landlord is 23.96%.*
- 2. Under “The PLA Agreement” FTWMC is only required to pay 76.04% of the obligation leaving the Landlord of The Listed Building to cover the remaining 23.96%. The area covered is outlined in blue which covers the Newcastle Jetty and adjacent wharves.*

At the time of the conversion of The Listed Building, Regalian was the Landlord and FTWMC the Head Lease Tenant. When the individual leases were drafted in 2001 specific mention was made to the service charges covering the Landlord's obligations towards the Head Lease with FTWMC. Please see bundle Annex 9 (part2) The Fifth Schedule 1 (h). It is page 58/59 of the lease. The wording is as follows: -

“(h) A due proportion (to be calculated by the Landlord whose decision shall be final and binding) of any and all sums paid or payable by the Landlord under the provisions of the Free Trade Wharf Management Company Lease including without limitation any sum payable on account of estimated or future expenditure but excluding any expenditure exclusively attributable to the Sports/Leisure centre referred to in the said lease (but for the avoidance of doubt this shall not exclude expenditure in relation to the structure or exterior of the said Sports/Leisure centre)”

Under Definitions which is on page 2 of the same lease it states the following: -

(13) "the Free Trade Wharf Management Company Lease" means the Lease dated 28th September 1995 and made between (1) the Landlord and (2) Free Trade Wharf Management Company Limited.

As a result of the above there has never been any doubt in the minds of previous Directors of FTWMC that the Listed Building Leaseholders are required to pay 23.96% of the Estate Charge and that the Jetty and Wharves are part of that Estate.”

20. This compelling evidence highlights that previously directors of the applicant have clearly believed that the legal provisions outlined by him enable the applicant to seek service charges for the jetty from LB lessees. Taken together the evidence of Mr Hymer and Mr Snowball is highly instructive in how the applicant has dealt with the property and how the company has dealt with the jetty in the context of the headlease. Indeed, it would seem incredible to this Tribunal that a business landlord such as Regalian could somehow take on the payment of 23.96% of a service charge item without making sure there was a mechanism in place to recover these potentially considerable sums from occupational lessees.
21. The Tribunal accepts that the existence of the headlease explains why there is no direct reference to the jetty lease in the 37 LB leases. There is historical meaning to this because the jetty lease was granted in 1987, the headlease in 1995 and the LB leases in an around 2000/2001. As has been noted therefore at the time of the granting of the phase 1 leases there was no headlease. Therefore, as the LB leases post-dated the headlease there was simply no necessity to include an express reference to or provision for the jetty lease.

22. The extent of the estate is not really made clear by the lease plans. With regard to the use of the phrase “for identification only” in a lease, the conveyancing law and practice is that in the event of inconsistency between plan and verbal description it is that the latter will prevail (*Eastwood v Ashton* [1915] AC 900). If the property is ‘more particularly delineated or described’ on the plan then the plan will prevail (see *Neilson v Poole* (1969) 20 P & CR 909). The effect of this in the event of inconsistency between plan and verbal description is that the latter will prevail (*Eastwood*).
23. The above analysis may not assist in that the estate in the LB leases is simply defined as all that land and buildings now known as the Listed Building 350 the Highway London E1 including the building, the common parts and the boundaries of the estate. The common parts are very extensively defined but without any specific mention of the jetty. Nevertheless, it seems to this Tribunal that the jetty has at the very least been part of the estate looked after by the applicant and where service charges for the upkeep of the jetty have been demanded and paid for by all the tenants of the property. At the very least two LB lessees have lease granted explicit rights over the jetty.
24. The question therefore arises whether the Jetty has been incorporated into the Estate. It is a question of fact whether the Jetty has been incorporated in this way. This incorporation occurred many years ago, since the Jetty has been treated as an Estate service charge item for a significant period of time. Furthermore, there is an express right for the landlord in the LB leases to incorporate land or buildings. The covenant states the landlord may

“add or extend or incorporate in the estate any adjoining or adjacent lands or buildings and lessor’s fixtures as the landlord in its absolute discretion shall think fit”.

25. Therefore, the lessor has the power to incorporate the jetty under this provision. Once incorporated a service charge liability will arise for the LB tenants.
26. In the alternative the Tribunal also considered if the jetty might fall into the definition of the common parts under the 37 LB leases. The lease definition is very long and lists many things capable of being used in common but makes no reference specifically to the jetty. But it does say that the definition includes “*each and every area and facility which are from time to time provided for common or general use by the tenant*” and all other occupiers and visitors and customers etc. The definition goes on to say that it covers

“all other facilities areas plant machinery and equipment of whatever nature and purpose included in the estate as shall from time to time be occupied used made available for use or

provided for common or general use as aforesaid or occupied or utilised for or in respect of the service charge not comprised in this lease or any other lease of a part of the estate.”

27. It seems to this Tribunal that this would cover the jetty as a common part under the lease definitions.
28. For all the reasons set out above the tribunal is of the view that the respondents are liable to pay service charges for the repair of the jetty structures.

Name: Judge Professor Robert
Abbey

Date: 9 August 2021

Appendix of relevant legislation and rules

Landlord and Tenant Act 1985 (as amended)

Section 18

- (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
 - (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
 - (b) the whole or part of which varies or may vary according to the relevant costs.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose -
 - (a) "costs" includes overheads, and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
 - (a) only to the extent that they are reasonably incurred, and
 - (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

- (1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
 - (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.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
- (a) the person by whom it would be payable,
 - (b) the person to whom it would be payable,
 - (c) the amount which would be payable,
 - (d) the date at or by which it would be payable, and
 - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
- (a) has been agreed or admitted by the tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

ANNEX - RIGHTS OF APPEAL

1. 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.
2. 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.
3. 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.
4. 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.