9736

FIRST TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/OOKF/LSC/2013/0121**
Property	**:**	**41A Whitefriars Crescent, Westcliff-On-Sea, Essex SS0 8EX**
Applicant Representative Limited	**:**	**Hickling Properties Limited (by its Agent) Squibbs Property**
Respondent Representative	**:** **:**	**Regis Group (Barclays) Limited**
Type of Application	**:**	**To determine the reasonableness and payability of service charges**
Tribunal Members	**:**	**G. Wilson (Chair)** **R. Thomas MRICS**
Date and venue of Inspection	**:**	**30 January 2014**
Date of Decision	**:**	

DECISION

Decision

The Application was dismissed.

Reasons

Background

1. This was an Application under section 27A of the Landlord and Tenant Act 1985 arising out of a dispute between two "professional" Landlords about the payability of so-called "Management Fees" for the three service charge years 2011, 2012 and 2013.
2. The claim for fees was resisted on the "single round of payability" and on the basis that there was no provision within the Lease for the collection of Management Fees.

3. The Lease in question (of a flat in a converted house) was dated 10th May 2011, by which deed an earlier lease had been surrendered and a new one granted. The lease terms were by reference to the earlier lease, dated 28th February 1989.
4. In the lease the tenant covenanted by clause 3.2) to:

> contribute and pay a proportionate part of the costs expenses outgoings and matters mentioned in the Third Schedule

The Third Schedule read as follows:

> 1. The expenses of maintaining repairing redecorating and renewing:
>
> (a) The main structure and in particular the foundations roof chimney stacks gutters and rain water pipes of the Building.
>
> (b) The gas and water pipes drains and electric cables and wires in under of upon the Building and enjoyed or used by the Tenant in common with the owners and Lessees of the other Flats.
>
> (c) The boundary walls and fences of the Building and of the common garden area.
>
> 2. The cost of decorating the exterior of the Building.
>
> 3. All rates taxes and outgoings (if any) in respect of any part of the Building which may be assessed separately from the Flat or from the other Flats.
>
> 4. The cost of insurance mentioned in sub-clause (2) of Clause 4 and of insurance against third party risks in respect of the Building.
>
> 5. The common parts hatched blue black and green on the plan annexed hereto. *[sic]*

5. By a letter dated 7th November 2013 addressed to the Tribunal the Landlord summarised the work that it had organised to be done to the property during the service charge years in question. In its Application to the Tribunal, the Landlord argued as follows:

> Although there is no determination within the lease that Management Fees can be implemented, we feel that these fees are justified. A Managing Agent is in principle entitled to a management fee for being on stand by, even if there is little or nothing for the agent to do. A Landlord has duties under the lease and needs to make arrangements for those duties to be carried out, as and when they need to be.

The Law

6. The question for the Tribunal was thus whether the lease covered the charge in question. The Tribunal reminded itself of the decision in *Gilje v Charlesgrove Securities Limited* [2002] 1 EGLR 41. The decision is usually regarded as authority for the proposition that items of service charge expenditure must be identifiable in the lease. Further and in summary, the courts tend to construe service charge provisions restrictively and are unlikely to allow recovery for items which are not clearly included.

7. In *Cadogan v 27/29 Sloane Gardens Limited* LRA/9/2005 HHJ Rich QC summarised the approach to be taken as follows:

> (i) It is for the landlord to show that a reasonable tenant would perceive that the [...] lease obliged him to make the payment sought.
> (ii) Such conclusion must emerge clearly and plainly from the words used.
> (iii) Thus if the words used could reasonably be read as providing for some other circumstances, the landlord will fail to discharge the onus upon him.
> (iv) This does not however permit the rejection of the natural meaning of the words in their context on the basis of some other fanciful meaning or purpose, and the context may justify a "liberal" meaning.
> (v) If consideration of the clause leaves an ambiguity then the ambiguity will be resolved against the landlord as a "proferror".

8. It has to be observed, however, that the courts have allowed what one writer has described as an "expansive" interpretation of the service charge clause. In *University Superannuation Scheme Limited v Marks and Spencer Plc* [1999] 1EGLR13 it was stated by Mummary LJ that:

> The purpose of the service charge provisions is relevant to their meaning and effect. So far as the scheme, context and language of those provisions allow, the service charge provisions should be given an effect that fulfils rather than defeats their evident purpose. The service charge provisions have a clear purpose: the landlord that reasonably incurs liability for expenditure in maintaining [the premises] for the benefit of all its tenants there should be entitled to recover the full cost of doing so from those tenants and each tenant should reimburse the landlord a proper proportion of those service charges.

Further, there are a number of Lands Tribunal cases involving local authority landlords where a similarly "generous" approach has been taken (see *L B Brent v Hamilton* RX/51/2005; *Norwich City Council v Marshall* LRX/114/2007; *Wembley National Stadium Limited v Wembley London Limited* [2008] 1P&CR 3). In the earliest of these cases it was described how the lease, which included the usual landlord's covenants, including the provision of services, may require expenditure to be incurred. If repairs were to be carried out, someone would have to be paid for doing the work and someone would have to arrange for the work to be done, supervised, checked and arrange for payment to be made. Hence the local authority could only act through its employees or agents, it would have to incur expenditure. If it did incur such expenditure, the lessee would be liable to pay a reasonable part of it.

9. What is not clear is whether this approach should extend to other commercial landlords. Equally, it is not easy to understand why the approach should be so restricted.

The Application

10. The argument made in the present case was, essentially, that a generous approach should be taken to the landlord's claim.

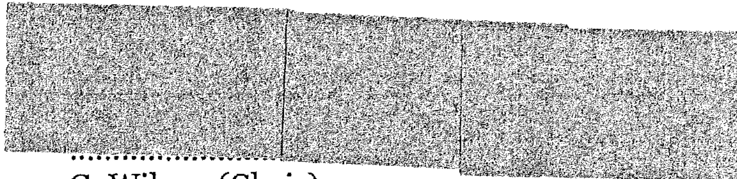
11. The Management Fees claimed in this case were £90 plus VAT at the applicable rate for each of the years in question. The Tribunal had no difficulty in concluding that the Management charges were reasonable but the question remained as to whether they

were payable. Turning to the lease, it was noted that Paragraph 5 of the Third Schedule had not been properly drafted. The Tribunal asked itself whether importance should be attached to the draftsman's choice of the word "expenses" in the first paragraph of the Third Schedule and the word "cost" in the second and fourth paragraphs. Was it possible to adopt a generous view of "expenses" as necessarily implying that the Landlord would have to arrange for the work to be done, supervised and so on, as the Landlord had argued?

12. Because it was not clear that the authorities referred to supported the generous approach, the Tribunal addressed the questions posed by the Lands Tribunal in the *Cadogan* case and were driven to the conclusion that the landlord could not show that a reasonable tenant would perceive that the lease in the present case obliged him to make a payment to Management Fees because the obligation to pay such fees did not emerge clearly and plainly from the words used so the landlord failed to discharge the onus upon them. At best, the clause left ambiguity. Ambiguity was to be resolved against the Landlord.

13. For these reasons the Tribunal dismissed the Application.

14. The Landlord's application, having failed, the Tribunal made an Order under section 20C of the Landlord and Tenant Act 1985 and which would be to the effect that the landlord's costs should not be taken into account on determining the amount of any service charge payable by the tenant.



G. Wilson (Chair)
17 February 2014.

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