First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CHI/00HN/LSC/2022/0020**
Property	:	**First Floor Flat, 96 Pine Road, Bournemouth, BH9 1NB**
Applicant	:	**Sheila Wickenden**
Respondent	:	**Greentree Estates & Investments Ltd.**
Date of application	:	**21st February 2022**
Type of Application	:	**To determine payability of service charges**
The Tribunal	:	**Judge Bruce Edgington**

DECISION

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1. The claims made by the Respondent's managing agents from the Applicant for managing agents' and accountants' fees in 2017, 2018, 2019, 2020 and 2021 are not payable.

2. I make an order pursuant to paragraph 5A of Schedule 11 to the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") preventing the Respondent from recovering any costs of representation in these proceedings from the Applicant. No such costs would be recoverable under the terms of the lease as a service charge.

Reasons

Introduction

3. The property is said to be a first floor self contained flat and I have noted from the pictures on Google Earth that the building in which it is situated is a 2 storey detached house in what appears to be a pleasant residential area. The Respondent's managing agents, Property Fusion Ltd., have sent demands for service charges for periods commencing on the 6th June 2017 up to and including 2021, to include managing agents' fees and accountancy fees which are the only items being challenged by the Applicant.

4. The challenge is that no such fees are payable under the terms of the lease i.e. there is no contractual obligation to pay them.

5. The Tribunal made directions orders on the 11th February, 22nd February, 23rd March, 25th March and 30th March 2022 timetabling the case to a determination. As the argument seemed to be based only on legal matters the Tribunal said that it would be content for the case to be determined on the basis of the papers and written representations without an oral hearing. The appropriate notice was given with a clear proviso that if a party wanted an oral hearing then one would be considered. For the same reason, the Tribunal indicated that it would not need to inspect the property. No request has been made for either an inspection or an oral hearing.

6. The directions orders refer to the Applicant having made an application for a costs order pursuant to paragraph 5A of Schedule 11 to the 2002 Act. The original application included such an application and was dated 24th December 2021. It was issued under case no. CHI/00HN/LAC/2021/0010. However, the Applicant used the wrong application form. The correct form is dated 21st February 2022 (application number as in the case heading above) and this says specifically that the Applicant is not making any such costs application. Neither party has referred to the Respondent's costs of representation in their submissions.

The Lease

7. The lease is dated 13th August 1982 and is for a term of 99 years from the 4th June 1982 with a rising ground rent. The Applicant is not the named lessee and the Respondent is not the named landlord. However, there is no dispute that they are, respectively, the current lessee and landlord. For the avoidance of doubt, this decision applies to all landlords under the terms of the lease unless the lease is to be amended by agreement or by the court or this Tribunal. The landlord has to keep the structure and common parts in repair and the building insured, and the lessee pays a proportion of the defined costs.

8. The lessee covenants in clause 4(ii) to "*Contribute and pay to the lessor from time to time and in addition to the rent hereinbefore reserved half of the costs and expenses mentioned in the Fourth Schedule hereto and the Certificate of the Lessor or the Lessor's Agents that any work carried out by the Lessor and falling within the matters referred to in the said Fourth Schedule where necessary shall be final and binding on the Lessee*".

9. The Fourth Schedule sets out the service charges which are payable i.e.:-

   "*1. The expenses of maintaining repairing and renewing* (there is then listed a number of items i.e. the roof, the structural walls, the boundary walls and fences, pipes, cables and wires used by the 2 occupiers of the flats, the foundations and all other common parts)

   2. The expenses of painting the exterior of the said property in a uniform

colour scheme once every four years of the said term or when otherwise agreed between the Lessor and the Lessee in writing

3. The expenses of maintaining the communal driveway shown coloured brown on the said plan in a good state of repair at all times"

10. The copy lease produced does not include the First Schedule from which I deduce that I do not have a copy of the whole lease. Nevertheless, it appears that the only mention of professional costs being payable are in clause 3(d) where it says that solicitors and surveyors fees payable in the forfeiture process (which this is not) are payable by the lessee and in clause 3(g) where solicitors costs are payable when notice is given to the landlord to register a transfer or assignment of the lease or a mortgage thereof or a copy of any applicable Probate or Letters of Administration is served on the landlord.

11. For the avoidance of doubt, the Respondent's representatives have not suggested that there are any other relevant clauses in the lease to support their case apart from clause 4(ii) and the Fourth Schedule.

The Law

12. Sections 18 and 19 of the **Landlord and Tenant Act 1985** ("the 1985 Act") define service charges so long as they are "*payable by a tenant*" i.e. the lessee is liable to pay them under the terms of the lease. Section 18 says that service charges are amounts which are "*payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management*" which includes overheads.

Discussion

13. The Applicant says that the managing agents have not actually undertaken any maintenance to the property. On Google Earth, the outside of the property including the roof appears to be in reasonable condition. The Applicant says that she and the other Lessee have undertaken all the management themselves at their expense and she states that the building is in good condition.

14. It is also worth bringing to the attention of the Respondent's managing agents that the Royal Institution of Chartered Surveyors has its own rules for members who are managing agents which say that if standard annual fees are being charged, those fees should include the cost of preparing annual service charge accounts particularly where, as in this case, the accounts are extremely simple and straightforward. This means, in effect, that in this sort of situation, separate accountant's fees would not be recoverable, even if reasonable in amount.

15. The landlord's representations simply say that the lease allows them to claim for managing agents' fees and accountants' fees. It seems to me that on an ordinary reading of the wording of the Fourth Schedule, such fees are not payable. I have looked at the usual rules of interpretation, even though they have not been specifically brought to my attention on behalf of the

Respondent.

16. In order to assist courts (and Tribunals) in difficult matters of interpretation, the *contra proferentem* rule was devised many years ago. It is not, of course, the only rule of interpretation but it is, perhaps the most relevant to this problem. It translates from the Latin literally to mean "against (*contra*) the one bringing forth (the *proferens*)".

17. 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'.

18. 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".

19. Thus, even if I were to find that there was an ambiguity in the wording of the Fourth Schedule – which I do not – it seems to me that I would have to rule in favour of the Applicant lessee in any event. This lease makes no mention of the landlord being able to claim managing agents' fee or accountants' fees in the list of things which can be included in a service charge.

Conclusions

20. I determine that none of the claimed managing agents' fees or accountants' fees claimed are payable. If the landlord is surprised by this decision, it should understand that the wording of the lease was known actually or by implication at the date it obtained the freehold title. In other words, if the Respondent was unsure or unclear about whether it could recover these expenses, it should have checked with its advisors at the time.

Costs

21. As I have previously indicated, there has been some confusion about whether any costs application was being made by the Applicant in view of her specific statement in the main (corrected) application that she was not pursuing such an order.

22. In order to resolve that confusion, I shall assume that such an application is being made. I have considered whether costs of representation can be claimed either as a service charge or as an administration charge under either paragraph 5 or 5A of Schedule 11 of the 2002 Act.

23. In any one of these alternatives, such costs have to be payable under the terms of the lease before the Tribunal can order payability or assess quantum. The terms of this lease only allow for litigation costs to be claimed, as stated, in the event of steps leading to possible forfeiture. This application is made by the tenant and therefore cannot, of itself, lead to forfeiture. For the avoidance of

doubt, the Respondent cannot recover costs of representation from the Applicant in view of the decision made in the main application.

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Judge Bruce Edgington
7th April 2022

ANNEX - RIGHTS OF APPEAL

i. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk 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.