UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT –Service Charges – whether costs of previous tribunal proceedings recoverable pursuant to service charge provision in lease – Appeal Dismissed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

SINCLAIR GARDENS INVESTMENTS (KENSINGTON) LIMITED

Appellant

and

AVON ESTATES (LONDON) LIMITED

Respondent

Re: Flat 7A,
7 Castlewood Road,
London
N16 6DU

His Honour Judge Bridge

The Royal Courts of Justice

5 July 2016

Mr Oliver Radley-Gardner, instructed by the Appellant
Mr Justin Bates, instructed by Scott Cohen Solicitors, for the Respondent

The following cases are referred to in this decision:

Arnold v Britton [2015] UKSC 36

Assethold Ltd v Watts [2014] UKUT 0537 (LC)

Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101

Conway v Jam Factory Freehold Ltd [2013] UKUT 0592 (LC), [2014] 1 EGLR 111

Francis v Philips [2014] EWCA Civ 1395

Geyfords Ltd v O'Sullivan [2015] UKUT 683 (LC)

McHale v Earl Cadogan [2010] EWCA Civ 14, [2010] 1 EGLR 51

Reston Ltd v Hudson [1990] 2 EGLR 51

Sella House Ltd v Mears [1989] 1 EGLR 65

Union Pension Trustees Limited v Slavin [2015] UKUT 103 (LC)

Introduction

1. This is an appeal against a decision of the First-tier Tribunal (Property Chamber) ("the F-tT") given on 29 September 2015 in a dispute over service charges. The issue arising is whether, on a true construction of the lease, the landlord was able to recover from leaseholders as part of a service charge the legal costs it had incurred in previous tribunal proceedings.

2. In its decision, the F-tT determined that the sum of £5,311.40 for the 2011/12 service charge year and the sum of £5,790 charged for the 2013/14 service charge year were not recoverable by the landlord from the tenant as service charges.

3. In the course of this appeal I have been greatly assisted by the conciseness and the lucidity of the submissions made by both counsel, Mr Radley-Gardner on behalf of the appellant landlord, and Mr Bates on behalf of the respondent tenant. I am very grateful to them both.

The Facts

4. The facts are not in dispute. The respondent is the lessee of Flat 7A, 7 Castlewood Road, London N16 6DU, holding a lease dated 27 March 1995 which was granted for a term of 99 years. The building comprises an end of terrace four-storey house containing three flats, each of which is let on a long lease. The appellant is the freeholder.

5. In 2010 and 2011, there were proceedings between the current parties before the F-tT under section 27A of the Landlord and Tenant Act 1985, and it is the legal costs incurred by the appellant in those proceedings which are now being claimed. Since October 2013 the management of the building has been in the hands of an RTM Company controlled by the three leaseholders.

The Lease

6. By Clause 3(A) the Lessee covenants with the Lessor that the Lessee will at all times during the term:

> Pay to the Lessor such annual sum as may be notified to the Lessee by the Lessor from time to time as representing the due proportion of the reasonably estimated amount required to cover the costs and expenses incurred or to be incurred by the Lessor in carrying out the obligations or functions contained in or referred to in this Clause and Clauses 4 and 6 hereof and in the covenants set out in the Ninth Schedule hereto…

The ‘costs and expenses’ are referred to in clause 3A as “the Management Charges”, the clause making further provision for the calculation and the time for payment of such charges and the establishment of a reserve fund.

7. By Clause 4 the Lessor covenants with the Lessee that the Lessor will perform and observe and carry out the covenants and obligations set out in the Ninth Schedule and the obligations on its part contained in the lease.

8. By Clause 6(A) it is agreed and declared as follows:

> That the Lessor shall at all times during the term hereby granted manage the Estate and the Block in a proper and reasonable manner and shall be entitled:
>
> > (i) to appoint if the Lessor so desires managing agents for the purpose of managing the Estate and Block and to remunerate them properly for their services;
> >
> > (ii) to employ architects surveyors solicitors accountants contractors builders gardeners and any other person firm or company properly required to be employed in connection with or for the purpose of or in relation to the estate and the Block or any part thereof and pay them all proper fees charges salaries wages costs expenses and outgoings;
> >
> > (iii) to delegate any of its functions under Clause 6 and sub-clause A(i) and (ii) of this clause and the Ninth Schedule hereof to any firm or company or any other body of persons whose business it is to undertake such obligations upon such terms and conditions and for such remunerations as the Lessor shall think fit.

The Claim

9. The application before the F-tT was made under section 27A Landlord and Tenant Act 1985. It sought a determination of the reasonableness and payability of service charges demanded from the tenants for the service charge years ending 31 March 2012 and 30 March 2013 and for the period from 1 April 2013 to 8 October 2013 (that latter date being the date that an RTM Company commenced management of the building). The claim concerned insurance costs, legal fees, additional management costs, administration fee, costs of hedge cutting, management fees, and an insurance cancellation charge.

10. The only matter outstanding in this appeal is the issue of legal costs. The legal costs in question related to solicitor’s costs and counsel’s fees incurred in relation to earlier proceedings before the tribunals under section 27A of the 1985 Act. The sums claimed were broken down by the F-tT (at its paras. 57 and 58) as follows:

> The sum of £5,311.40 charged to the 2011/12 service charge year is broken down as follows:
>
> - £2,547 – solicitors fees relating to the 2010 Tribunal Proceedings;

- £200 – tribunal fee relating to the 2011 Tribunal Proceedings;
- £2,564 – solicitors fees relating to the 2011 Tribunal Proceedings.

The sum of £5,790 for the 2013/14 service charge year is broken down as follows:

- £720 – counsel's fees to settle a statement of case in the Upper Tribunal Proceedings;
- £2,370 – solicitors fees in the Upper Tribunal Proceedings;
- £2,700 – counsel's fees for settling skeleton argument and brief fee for the Upper Tribunal Proceedings.

Proceedings before F-tT

11. The F-tT ruled against the landlord's contention that the issue of recoverability of legal fees had already been conclusively determined in previous proceedings (a submission of issue estoppel) and no appeal is pursued in relation to that ruling. It then construed the Lease, holding (at para.69):

> ..clause 6 of the Lease is sufficiently broad to encompass the costs of instructing solicitors and counsel in tribunal proceedings. In our view the costs were incurred "… *in connection with or for the purpose of or in relation to the estate and the Block of any part thereof*…". In our view seeking a determination from this Tribunal as to the payability of service charges by the Tenants is conduct that concerned "the estate" and/or "the Block". We do not agree with the tenants' submission that in order for solicitors costs to be recovered under this clause the solicitors need to be engaged in management. The clause is much broader than that limited interpretation.

12. The F-tT did not accept that costs should be assessed on the indemnity basis but found that all the sums claimed were reasonably incurred.

13. By application dated 22 July 2015, the tenant sought permission from the F-tT to appeal its decision to the Upper Tribunal. The F-tT responded by notifying the parties that it intended to carry out a review of its earlier decision as there appeared to be a ground of appeal on which the tenants were likely to be successful. In directing a review, the F-tT intimated that it may have erred in not providing adequate reasons for its decision to distinguish previous authority and that it considered that its previous decision was arguably incorrect in light of the approach taken by the Tribunal in the case of *Union Pension Trustees Limited v Slavin* [2015] UKUT 103 (LC), a case that had only been reported after the date of its decision.

14. The F-tT conducted its review following the submission by the parties of written representations. In the course of its review, it stated that it had not given proper consideration in its earlier decision to the construction of the lease as a whole. It did not follow *Slavin* as such, but it adopted an approach which was clearly influenced by that decision. The F-tT concluded (at para.37):

> …in our view the ordinary and natural wording of clause 6A, when viewed in the context of the terms of the lease as a whole cannot be stretched so as to enable the Respondent to recover, as service charge, costs incurred in the enforcement of outstanding service charges or the associated costs of litigation brought under s.27A Landlord and Tenant Act 1985.

15. The F-tT decided that, in view of its determination that there was no contractual right to recover litigation costs as a service charge, there was no need to make an order under section 20C Landlord and Tenant Act 1985. Permission to appeal was refused by the F-tT, but was granted by the Tribunal on 7 January 2016, the Deputy President observing:

> It is arguable, for the reasons given by the applicant in its grounds of appeal, that the F-tT wrongly interpreted clause 6(A) of the lease by excluding the costs incurred in employing solicitors and counsel to conduct proceedings before the tribunal from the scope of expenses which could form part of the service charge.

16. The Deputy President directed that the appeal would be dealt with as a review of the decision of the F-tT and conducted under the Tribunal's standard procedure. Subsequently, the tenant sought permission to cross appeal which was granted on 29 February 2016 by the Tribunal, the issue being whether the landlord was precluded from recovering the costs incurred following the acquisition of the right to manage by an RTM Company.

Submissions on the appeal

17. Mr Radley-Gardner, for the appellant landlord, submitted that clause 6(A) expressly provided for the costs of employing solicitors to be recoverable from the tenants. He contended that clause 6(A) should be read disjunctively into two component parts. The clause first imposes an obligation on the Lessor to manage the Estate and the Block in a proper and reasonable manner and then empowers the Lessor in the terms of the remainder of the sub-clause. The Lessor is entitled to appoint managing agents for the purpose of managing the Estate and Block and to remunerate them for their services. He is also entitled to employ, amongst others, solicitors, provided that they are "properly required to be employed in connection with or for the purpose of or in relation to the Estate and the Block or any part thereof" and pay them all proper fees accordingly. Mr Radley-Gardner emphasised that clause 6(A)(ii) does not include any reference to management of the estate and in the absence of any such provision the sub-clause should be construed as being wide enough to include the costs of instructing solicitors (and for that matter counsel) to conduct proceedings for Tribunals.

18. Mr Radley-Gardner did not consider that the decision in *Slavin* should have made any material difference to the decision of the F-tT. In particular, it did not justify any "reading down" of clause 6(A)(ii). The clause under construction in *Slavin* made no explicit reference to solicitors, or for that matter to the cost of proceedings before Tribunals. In short, counsel for the landlord in *Slavin* had had to rely on "general words" of the clause in question, and while accountants and surveyors were referred to, solicitors were not.

19. Mr Bates on behalf of the respondent tenant invited the Tribunal to look more widely at the full structure of the Lease, rather than viewing clause 6(A)(ii) in isolation. He invited the Tribunal to commence with clause 3A and to consider the relationship between clause 3A and clause 6 in the context of the lease as a whole. He made reference to schedule 7 which contains a number of specific covenants entered into by the Lessee and which makes reference to instances where solicitors would be entitled to charge the tenant. He accepted, as did Mr Radley-Gardner, that previous authorities (even *Slavin*) were of little assistance and that it was essential to consider the meaning of the words used in the Lease in their documentary, factual and commercial context, applying the necessary commercial common sense as explained by the Supreme Court in *Arnold v Britton* [2015] UKSC 36.

Principles of construction

20. Whether a landlord is entitled to recover legal costs incurred in relation to tribunal proceedings against its tenants depends upon the true construction of the service charge clause contained in the lease. The construction of such clauses has been the subject of a number of recent decisions of the Tribunal, although the leading authority is the decision of the Supreme Court in *Arnold v Britton*, above. Service charge clauses are not subject to any special rule of interpretation but should be construed as any other written contractual provision. The principles applicable to the interpretation of written contractual provisions were succinctly were set out by Lord Neuberger at [15]:

> 'When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 at [14]. And it does so by focussing on the meaning of the relevant words… in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.'

21. It is rudimentary that the clause must be construed, that is its natural and ordinary meaning must be ascertained, in the light of its context, which in the case of a service charge clause involves consideration of the lease as a whole, taking into account the circumstances existing at the time of the grant. Each case is fact-specific, in the sense that what must be construed is the particular clause in the particular lease of the particular property, and conclusions arrived at by previous courts or tribunals in relation to other clauses in other leases of other property are unlikely to be of much assistance. It is axiomatic that, in determining the natural and ordinary meaning of a clause from the point of view of a reasonable person with the relevant background knowledge, the court or tribunal is to apply commercial common sense. Although context is an important consideration, it is not everything, Lord Neuberger warning at [17] that the importance of the language of the provision should not be undervalued by over reliance upon commercial common sense and the

surrounding circumstances. It follows that the clearer the natural meaning of the provision the more difficult it will be to justify departing from it.

22. There is no need to construe service charge clauses restrictively (see Lord Neuberger at [23]). That said, 'it is reasonable to expect that, if the parties to a lease intend that the lessor shall be entitled to receive payment from the tenant in addition to the rent, that obligation and its extent will be clearly spelled out in the lease': see *Francis v Philips* [2014] EWCA Civ 1395 at [74] *per* Sir Terence Etherton C. The court or tribunal should not therefore (as stated by Rix LJ in *McHale v Earl Cadogan* [2010] EWCA Civ 14, [2010] 1 EGLR 51 at [17]) 'bring within the general words of a service charge clause anything which does not clearly belong there.' This approach underlies one of the earliest decisions on the recovery of litigation costs pursuant to a service charge clause where Taylor LJ required 'clear and unambiguous terms' before he would permit a landlord to claim the legal costs of proceedings against defaulting tenants from another tenant who had paid his rent and service charges in compliance with the terms of his lease: see *Sella House Ltd v Mears* [1989] 1 EGLR 65.

23. There is no hard and fast rule that legal costs cannot be recovered where the clause employs 'general words' and makes no specific mention of lawyers or the costs of legal proceedings, as evidenced by two decisions of the Upper Tribunal (*Conway v Jam Factory Freehold Ltd* [2013] UKUT 0592, [2014] 1 EGLR 111; *Assethold Ltd v Watts* [2014] UKUT 0537.) However, the requirement of clarity means that in such circumstances there must be 'other language apt to demonstrate a clear intention that such expenditure should be recoverable': see *Union Pension Trustees Ltd v Slavin* [2015] UKUT 0103 (LC) *per* the Deputy President.

24. I approach construction of the service charge clause in this case asking whether it is sufficiently clear to demonstrate an intention of the parties to the lease that the clause permits recovery of the legal costs incurred by the landlord in conducting proceedings before the tribunal to determine the extent to which the tenants were liable to pay. Mr Radley-Gardner says that it is; Mr Bates says that is not.

Construction of the lease

25. The lease was granted in 1995 for a term of 99 years. No specific point has been made by either party concerning the circumstances, including 'the relevant statutory landscape' (see *Geyfords Ltd v O'Sullivan* [2015] UKUT 683 at [46]), known to the parties at the date of the grant.

26. The service charge clause, which is the obvious starting point, is clause 3(A). It imposes an obligation on the Lessee to pay a due proportion of the amount required to cover the 'costs and expenses' incurred by the Lessor in carrying out certain 'obligations or functions'. The 'costs and expenses' which the Lessee may be liable to reimburse are described as 'Management Charges'. The 'obligations or functions' are those contained in Clause 3 itself, Clause 4 (which incorporates by reference the landlord covenants set out in the Ninth Schedule to the lease, covenants which are also expressly referred to in Clause 3) and Clause 6 (which I will deal with separately below). Provision is made for the method of calculation of

the Management Charges, the time for payment, and the accounting process that would take place in the event of the estimated sum being lower or higher than the amount actually (that is, 'properly and reasonably') expended.

27. Clause 6(A) imposes on the Lessor the duty to manage the Estate (defined in the First Schedule as all that area of land outlined in red on the plan attached, comprising land garden flats garages parking spaces stores and premises, known as the Castlewood Road Estate) and the Block (defined in the Second Schedule as all that piece or parcel of land being part of the Estate and known as 7 Castlewood Road together with the flats erected thereon or on some part thereof but excluding all other parts of the Estate). It gives the Lessor power ('shall be entitled') to do three things (each separately enumerated as (i) (ii) and (iii) respectively), namely to appoint managing agents, to employ a range of persons, including solicitors, and to delegate any of its functions.

28. Mr Radley-Gardner has submitted that the duty to manage conferred at the outset of Clause 6(A) should be read entirely separately, it might be said disjunctively, from the remainder of the clause. He says that the clause does two separate things, first imposing a duty to manage, and secondly conferring a number of powers, and that it should not be assumed that those powers are conferred solely in order to enable the landlord to discharge its managerial duty. He refers specifically to clause 6(A)(i) which states in terms that the Lessor is entitled to appoint if it so desires managing agents 'for the purpose of managing the Estate and Block'. No similar qualification is made in either clause 6(A)(ii) or clause 6(A)(iii). Clause 6(A)(ii) should not therefore be read so as to limit the landlord's power to circumstances where it is carrying out its duty to manage the estate. It follows, on his reasoning, that the power, which is explicit, to employ solicitors, is only qualified by the words contained in clause 6(A)(ii) itself. Those words- that the solicitors employed must be 'properly required to be employed in connection with or for the purpose of or in relation to the estate and the Block or any part thereof'- do not significantly limit the activities for which solicitors may be employed by the landlord. They should not be 'read down'. The purpose for which solicitors, and counsel, were employed- to bring proceedings before the tribunal to establish what service charges were payable- was amply within the scope of the power conferred by Clause 6(A)(ii), and it follows that the costs of instructing those solicitors are therefore recoverable pursuant to Clause 3.

29. I do not agree with the approach of Mr Radley-Gardner. I do not accept, to begin with, that Clause 6(A) should be read disjunctively. The powers contained in the three sub-clauses (or perhaps I should say sub-sub-clauses) are clearly intended to enable the landlord to manage the estate. Management may be effected by appointing managing agents who will obviously then need to be remunerated for their services. Management may be effected by employing any of a range of persons (some professional, others not) who, provided they are 'properly required to be employed', are also entitled to be remunerated. Finally, management may be affected by delegation of the landlord's functions under Clause 6 to any firm or company with the appropriate expertise.

30. I accept that neither Clause 6(A)(ii) nor Clause 6(A)(iii) make explicit reference to the management function, whereas Clause 6(A)(i) does, but I do not think that renders them self-standing provisions which are thereby detached from the remainder of the clause. Clause

6(A)(ii) allows employment of (inter alios) solicitors 'properly required to be employed in connection with or for the purpose of or in relation to the estate and the Block or any part thereof'. It is not immediately clear what is meant by 'the purpose of the estate', but in my judgment the application of commercial common sense, with due reference to the intended relationship between the parties to the lease, leads inexorably to the conclusion that the only possible purpose that this can be referring to is the management of the estate. It is important to bear in mind that the expenditure incurred by the landlord in the exercise of its Clause 6 powers is capable of being recouped from the tenants by means of what is described as a 'Management Charge'. I take into account also the reference to 'functions' in Clause 6(A)(iii) which, again in context, can only mean its functions of management.

31. Mr Bates conceded that litigation may in certain circumstances be conducted in the ordinary course of managing an estate. He referred to two cases where litigation costs were recovered pursuant to a service charge clause. In *Reston Ltd v Hudson* [1990] 2 EGLR 51, the landlord recovered as a 'cost of management of the estate' the legal costs of seeking a ruling from the court as to whether the repair of windows was the responsibility of the landlord or the tenants. This was an issue which affected every leaseholder in the block of flats concerned. In *Conway v Jam Factory Freehold Ltd*, above, the landlord recovered as costs incurred 'in the management of the building' the costs of employing solicitors and counsel to defend an application by leaseholders of flats in the building for the appointment of a manager under section 24 of the Landlord and Tenant Act 1987. However, he contended forcefully that all depended on the lease in question and that in the circumstances of the current case, the costs being claimed were not recoverable under the relevant charge.

32. Clause 6(A)(ii) does of course make explicit reference to solicitors. But I agree with Mr Bates that the mere reference to 'solicitors' in clause 6(A)(ii) cannot possibly mean that the landlord has *carte blanche* to instruct solicitors for any purpose. In my judgment, the limit to their employment is that they must be employed for the purposes of the management of the estate. If that is done, then their proper fees can be paid and the sums so expended recovered from the tenants pursuant to the service charge clause.

33. The Ft T reviewed its original decision, leading to a change in the result of the application, in the light of the decision of the Tribunal in *Union Pension Trustees v Slavin*, above. Although I have already stated my reservations concerning previous decisions being treated as in any way authoritative or precedential, I should, in deference to the F-tT deal briefly with *Slavin*. The lease was granted for 999 years in 1981. The landlord claimed to recover the costs of tribunal proceedings as part of the service charge. There the similarities ended. The service charge in question was very different to that being construed in this case. It made no reference to solicitors or their expenses or the costs of legal proceedings. The lease contained an express covenant by the tenant to pay all costs incurred in relation to proceedings initiated under sections 146 or 147 of the Law of Property Act 1925, those costs to include solicitors' counsel's and surveyors' costs and fees. The 'noticeably contrasting' linguistic differences between the service charge and the above tenant covenant clearly weighed with the Tribunal, suggesting that the parties to the lease did not intend legal costs, in the sense of the costs of legal proceedings, to come within the scope of the service charge clause.

34. Reference was made by Mr Bates to other provisions in the lease which make explicit reference to solicitors. He took me to the Seventh Schedule which contains Lessee's covenants. At paragraph 11, the Lessee covenants within 21 days of assignment transfer underletting and so forth to produce the assignment (or such other transfer) to the Lessor's solicitor and to pay to that solicitor the reasonable costs of registration. At paragraph 16, the Lessee covenants to pay all expenses incurred by the Lessor incidental to preparation and service of a notice under section 146 or of a Schedule of Dilapidations, and it is expressly stated, in parentheses, that such expenses shall include 'Solicitors costs and surveyors fees'. At paragraph 21, the Lessee covenants 'to pay the Lessor's Solicitors costs and surveyors fees in connection with every application for the consent or approval of the Lessor as may be required hereunder.'

35. Mr Bates contrasts the specific reference in each of these provisions to particular events in the life of the leasehold which makes express provision for the recovery of solicitors' costs with the general words of Clause 6(A). A similar point was made in *Slavin* where reference was made to more specific provisions elsewhere in the lease as indicating that general words were not intended to impose liability for the costs of litigation. Mr Radley-Gardner denied that the words in Clause 6(A) are as 'general' as the words in *Slavin*, and in that he is right as there is here express reference to those 'solicitors' who may properly be required to be employed. For myself, the provisions referred to by Mr Bates do not by any means conclude the matter, but they do give support to the construction of the lease which I have arrived at.

36. In my judgment, the F-tT may have given disproportionate weight to the result in *Slavin* when one takes into account the clear differences between the clauses and the leases in that case and in this. However, the reasoning in *Slavin*, and the manner in which the Upper Tribunal conducted the exercise of construction (by reference to the lease as a whole rather than the clause in particular) was rightly influential. Having construed the lease myself, I have reached the view that in the course of its review the F-tT arrived at the correct result in denying that the landlord was able to recover legal costs under the service charge clause. It follows that I do not consider that the F-tT reached the correct conclusion when it made its original decision, but no point is, rightly, taken by Mr Radley-Gardner in this regard. I consider that the decision of the F-tT on review was the right decision and, that being the case, the landlord's appeal must be dismissed.

Cross-appeal

37. The tenants cross-appealed, with the permission of the Tribunal, contending that the landlords could not bring proceedings to recover service charge as a result of their management functions being transferred to an RTM company in October 2013. I heard argument on this interesting and difficult issue which involved detailed analysis and consideration of sections 96 and 97 of the Commonhold and Leasehold Reform Act 2002. I am surprised that it has not apparently been decided in any previous case.

38. It is with genuine regret that I have decided, that in view of my decision on the main issue, it is neither necessary nor desirable for me to rule on this argument. Nor is it necessary for me to consider whether an order under section 20C of the Landlord and Tenant Act 1985 should be made.

HH Judge Stuart Bridge

4 August 2016