



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

Case Reference : CHI/43UB/LIS/2017/0006

Property : Flat 10, Ellesmere Court, Ellesmere Road,
Weybridge, Surrey. KT13 0HT

Applicant : Ellesmere Court Limited

Representative : Whitemews Lettings & Property Management
Limited (Mr David Whyte)

Respondents : Mrs J L Mansfield

Representative : Mr G Mansfield

Type of Applications: Application for determination as to reasonableness
of service charges pursuant to Section 27A
Landlord and Tenant Act 1985 ("the 1985 Act")

Tribunal Member : Judge P.J. Barber

Date of Decision: 7th September 2017

DECISION

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Decision

- (1) The Tribunal determines in accordance with the provisions of Section 27A Landlord and Tenant Act 1985 ("the 1985 Act") that none of the service charges for any of the service charge years 2011; 2012; 2013; 2014, 2015; 2016 & 2017 are payable by the Respondent to the Applicant.

Reasons

INTRODUCTION

1. The application in this matter dated 13th January 2017, was made pursuant to Section 27A of the 1985 Act for determination of the reasonable service charges payable by the Respondent to the Applicant in the service charge years 2011, 2012, 2013, 2014, 2015, 2016 and 2017. Directions were issued in the matter on 17th March 2017 and, also further directions, following a case management hearing, on 2nd May 2017. The Applicant had indicated that a paper determination of the matter would be acceptable; neither party objected, and accordingly the matter has been determined on the papers without an oral hearing.
2. By a letter dated 11th July 2017, the Respondent`s representative, Mr Mansfield complained that the Applicant had failed to comply with certain of the time limits set in the earlier directions; Mr Whyte requested additional time for compliance owing to ill health and in consequence, the Tribunal agreed by letter dated 14th July 2017, to extend the times for compliance with certain of the provisions in the earlier directions.
3. The Applicant provided a bundle of evidence in this matter to the Tribunal on 16th August 2017, including variously, the application, the directions, letters and statements by the respective parties, copy lease, and various copy accounts, reports and demands for payment. The copy lease included in the bundle relates to Flat 10, Ellesmere Court ("the Flat") and is dated 9th April 2009 and made between Ellesmere Court Limited (1) and Enfranchisement Capital Holdings Limited (2) for a term of 999 years ("the 2009 Lease"). The 2009 Lease was expressed to be granted subject to and with the benefit of the "Subsisting Lease" which is defined in the 2009 Lease as being the lease dated 16 October 1978 made between (1) House Owners Investments Limited and (2) Stanley Wallis Chandler and Joan Hope Chandler, for a term expiring in 2077.

THE WRITTEN REPRESENTATIONS

4. By letter dated 13th June 2017, the Respondent`s representative Mr Mansfield, referred to provisions in the 2009 Lease, including the lessee`s covenant to contribute one-twelfth of all costs incurred by the lessor in carrying out its obligations, and also the obligation upon the lessor to keep proper books of account of all costs and expenses incurred, to be audited by a competent chartered accountant. Mr Mansfield further referred to the definition of "the Lessor" in the 2009 Lease, expressed in that document as being: "*The Lessor includes the person or persons for the time being entitled to the reversion immediately expectant on the determination of the term hereby created*"; Mr

Mansfield asserted that in accordance with such definition, the Lessor is Enfranchisement Capital Holdings Limited ("ECHL"); he also suggested that ECHL was granted a concurrent lease on 20th February 2008. Mr Mansfield submitted that, if it is decided "...that Ellesmere Court Limited, and not the lessor Enfranchisement Capital Holdings Limited is entitled to claim service charges from the Lessee this would demonstrate a unilateral change within the terms of the existing lease as granted to the lessor in 1989". In addition, Mr Mansfield said that unaudited accounts relating to Ellesmere Court Limited have been submitted in support of service charge demands, in breach of the requirements of the 2009 Lease. Mr Mansfield stated that unaudited accounts were produced for Ellesmere Court Limited for the service charge years 2009-2014 by TWP Accounting LLP. Mr Mansfield further stated that the 2009 Lease requires audited accounts for service charges, not company accounts of the freeholder, adding that all charges are disputed, although referring to an agreement in a letter from the Applicant's agent, White Mews, deciding not to claim for service charge arrears in 2009 and 2010, given that no Summary of Tenant Rights & Obligations had been attached with the demands for those years. Mr Mansfield added that there is no provision in the lease for service charges to be levied solely on budget predictions, and that the sums claimed were unclear. Mr Mansfield further submitted that the demands had not included the name and address of the landlord, nor the required Summary of Tenant Rights & Obligations; he also asserted that works resulting in charges of more than £250.00 had not been consulted upon as required by Section 20 of the 1985 Act, and further claimed that, to his knowledge, service charge moneys are not being held in a trust account in accordance with Section 42A of the 1985 Act.

5. By letter dated 19th July 2017, the Applicant's representative, Mr Whyte submitted in broad terms that the Respondent had acknowledged responsibility to pay service charges to the Applicant; he further submitted that the Respondent had withheld payment on the basis of the service charge accounts as supplied, and by reference to Companies Act legislation, and also referring to allegations made by Mr Mansfield against TWP Accounting LLP and others, which he said are separate to these proceedings. Mr Whyte submitted that the Lessor is correctly Ellesmere Court Limited and not ECHL as suggested by Mr Mansfield. Mr Whyte stated that the allegation as to a lack of audited accounts was a separate allegation against TWP Accounting LLP; he added that it was incorrect to state that the Lease requires audited accounts for service charges, not company accounts of the freeholder. Mr Whyte also stated that Section 20 consultation regarding major works had taken place in 2015. Mr Mansfield further submitted that it was incorrect to say that there is no separate designated account and that allegations as to failure to comply with legislation are incorrect. Mr Whyte said that the original lease dated 16th October 1978 (referred to and defined in the 2009 Lease as the "Subsisting Lease"), had been superseded by the 2009 Lease. Mr Whyte further included a short analysis of service charges for the years 2010 to 2018, on the basis of a single line entry for each year, adding that it is clear that the Respondent is responsible for the payment of service charges to Ellesmere Court Limited as per such summary. Mr Whyte further stated that Ellesmere Court Limited was incorporated in 2006, that TWP were appointed in 2010 and that the company is totally exempt from audit, with references to various sections in Companies Act legislation. Mr Whyte further asserted that according to ICAEW guidelines, there is no statutory requirement for the routine preparation of

service charge accounts, no recognised accounting framework for service charge statements, and also that there is scope for the parties to a lease, to consider what procedures may be required by the term "audit".

6. By letter of response dated 1st August 2017, Mr Mansfield submitted broadly that the original lease dated 16th October 1978 ("the Subsisting Lease"), was a headlease and that the grant of the 2009 Lease unilaterally changed the Subsisting Lease, to an underlease with a new landlord, which he said is ECHL, adding that ECHL would be entitled to charge ground rent and to receive all moneys from a lease extension or purchase of their freehold interest. Mr Mansfield submitted that the company accounts of Ellesmere Court Limited, whether audited or not, are irrelevant and that the Lessor ECHL, must provide annually audited accounts for expenses incurred by them whilst carrying out their covenants under the Lease. Mr Mansfield disputed Mr Whyte`s claim that Mr Mansfield`s statements are incorrect. Mr Mansfield restated that the expenses and service charges are not supported by audited accounts as required under the existing lease, adding that Mr Whyte had admitted at the telephone case management hearing, to being unable to find any invoices relating to service charges; Mr Mansfield added that without invoices it would be impossible for the accounts to be audited by a competent accountant. Mr Mansfield further stated that the lessor had covenanted to provide audited accounts for incurred expenses, and that there is no ambiguity in the 2009 Lease regarding the requirement for accounts to be audited. Mr Mansfield again challenged the creation of what he referred to as the unilateral concurrent 2009 Lease, with varied terms for the same property as the 1978 Subsisting Lease. Finally Mr Mansfield submitted that moneys previously paid by the Respondent to Ellesmere Court Limited, were only paid in the belief that such company was the lessor and should be repaid or credited against future legitimate service charges.
7. By a further statement dated 16th August 2017, Mr Whyte submitted in broad terms that the 2009 Lease was lawful, and that Ellesmere Court Limited is entitled to collect service charges. Mr Whyte repeated that the Respondent did not understand the requirement for audit by a competent chartered accountant in the context of the Companies Act 2006, and contested the expectation that ECHL should have provided audited accounts. Mr Whyte further suggested that the Respondent had not provided any documentation to verify the legitimacy of ECHL as lessor. Finally Mr Whyte referred to previous proceedings in the County Court apparently in relation to earlier unsuccessful attempts at debt recovery in relation to service charges.

THE LAW

8. Sub-Sections 27A (1), (2) and (3) of the 1985 Act provide that :

"(1) An application may be made to a leasehold valuation 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 a leasehold valuation 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 cost, 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.

“Service Charges” are defined in Section 18 of the 1985 Act as follows

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, 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

18(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.

18(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.

CONSIDERATION

9. The Tribunal have taken into account all the submissions as well as the case papers provided by the parties and contained in the bundle.

10. The 2009 Lease incorporates various definitions including the following:

“Subsisting Lease”: “the Lease dated 16 October 1978 made between (1) House Owners Investments Limited and (2) Stanley Wallis Chandler and Joan Hope Chandler and registered under title number SY476800 (a copy of which is annexed to this Lease).”

“Participation Agreement” : “an agreement dated 20 September 2006 made between the Lessee and other Participators (as defined in the agreement) and the Lessor in relation to the collective enfranchisement of the Estate pursuant to the Leasehold Reform, Housing and Urban Development Act 1993.”

“Estate” : “the building or group of buildings and curtilage known as Ellesmere Court Ellesmere Road Weybridge Surrey K13 0HT the freehold interest in which is registered at the Land Registry with title number SY128092.”

Recital 2.1 in the 2009 Lease refers to the Lessor having acquired the freehold interest in the Estate as nominee for the Lessee and the Participators (as defined in the Participation Agreement), and recital 2.2 in the 2009 Lease says that the Participation Agreement provided for the grant of new long leases of the flats in the Estate to the Lessee and the other Participators. The Applicant’s statement at Page 5.3.1/2 in the bundle, refers to Ellesmere Court being *“owned by Ellesmere Court Limited following a successful enfranchisement claim made in 2008.”* It would have assisted the Tribunal if the parties had provided copy Land Registry entries for each of the freehold and leasehold interests, in order to clarify the position. Notwithstanding this, by virtue of clause 4.1 in the 2009 Lease, “the Lessor” is expressed to have demised Flat 10 to “the Lessee”, subject to and with the benefit of the “Subsisting Lease”. Accordingly the 2009 Lease does not supersede the “Subsisting Lease” but was granted subject to it. The term “the Lessor” is defined in the 2009 Lease as being Ellesmere Court Limited, albeit by virtue of clause 4.1 in the 2009 Lease, the Lessor holds as nominee for, and at the direction of ECHL. Nevertheless, the term “the Lessor” in the 2009 Lease, refers to Ellesmere Court Limited.

11. Clause 5.2 in the 2009 Lease requires payment by way of additional rent, of a sum equal to those sums payable by the Lessee to the Lessor under the Lease Provisions; the term “Lease Provisions” is in turn defined in the 2009 Lease as being “the provisions contained in the Subsisting Lease as varied by the Variations.” The term “Variations” includes those variations of the Subsisting Lease as are contained in the First Schedule to the 2009 Lease – at Pages 6.1.12/34 & 6.1.13/34 of the bundle. Such “Variations” do not materially alter the principal covenants on the part of the Lessor in the Subsisting Lease, as contained in the Seventh Schedule of that document. Clause 14 of the Seventh Schedule of the Subsisting Lease requires the Lessor to *“...keep proper books of account of all costs and expenses incurred by it in carrying out its obligations under this Schedule...”*; clause 15 to the Seventh Schedule requires that *“The account taken in pursuance of the last preceding clause shall be prepared and audited by a competent chartered accountant who shall certify the total amount of the said costs and expenses (including the audit fee of the account) for the period to which the account relates and the proportionate amount due from the Lessee to the Lessor pursuant to clause 19 of the Sixth Schedule and the said accounts shall be produced to the Lessee by the Lessor as soon as they shall have been so prepared and audited by the chartered accountant.”* The Applicant has produced in the bundle at Pages 8.3.1/12 to 8.9.9/9, variously, unaudited financial statements for Ellesmere Court Limited for 2010, including profit and loss, and balance sheets for the company. Similarly for 2012-2014 inclusive. An unaudited statement of service charge account for 2015 is included at Page 8.7.1/6, and further unaudited company accounts for 2016 and 2017. Copies of various invoices for service charge amounts are included at Pages 11.1 to 11.7.3/3 of the bundle. However, no service charge accounts, audited as required by the lease, by a chartered accountant have been produced by the Applicant, nor have any of the supporting receipts or vouchers detailing any of the actual expenditure, been

produced for any of the items of expenditure for any of the years which are the subject of the claim.

12. Clearly the Subsisting Lease (to which the 2009 Lease is expressly subject) does require an account of all expenses incurred by the Lessor to be prepared and audited by a competent chartered accountant, who shall certify the proportionate amount due from the Lessee. The production of company accounts for Ellesmere Court Limited is not sufficient to satisfy this requirement and in the absence of audited service charge accounts, properly audited as required, for the whole of the period in dispute, the requirements of the respective leases have not been met.
13. In addition and, as noted in paragraph 8 of the directions dated 2nd May 2017, Mr Whyte had explained at the telephone case management hearing, that he had taken over from Wallakers as managing agent and that he had only received copies of the service charge demands from Wallakers, but not any of the supporting documents. At paragraph 11 of the directions, the Applicant was directed to send to the Respondent copies of all demands, invoices, estimates and S.20 Consultations covering the period in dispute that are in their possession or which they are able to obtain. It is apparent from the bundle that the Applicant has in the event, only produced copies of invoice demands for service charges, but none of the detailed supporting receipts and vouchers, which might, if produced, verify and/or justify any of the service charges being demanded. In such circumstances the Tribunal is unable to determine that any of the service charges as claimed, are reasonable and payable.
14. Accordingly, given the absence of audited accounts for any of the service charge years in dispute, similarly the unavailability of any of the required annual certificates as to the proportionate amount due from the Lessee to the Lessor, and also the lack of any supporting receipts and vouchers whatsoever, the Tribunal determines that none of the service charges in any of the years as claimed, is payable by the Respondent to the Applicant.
15. We made our decisions accordingly.

Judge P J Barber

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.