UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – construction of lease – whether the costs of employing a chartered accountant to provide the relevant account of the service charges and the required certificate could be included within the service charges payable by the lessee

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN **RALPH RETTKE-GROVER** **Appellant**

and

Respondents

JOHN ELLOTT NEEDLEMAN
ANN-MARIE WOLFRYD

Re: First Floor Flat,
8 Ulva Road,
Putney,
London,
SW15 6AP

Before: His Honour Judge Nicholas Huskinson

Sitting at: 43-45 Bedford Square, London, WC1B 3AS
on 7 July 2011

The Appellant appeared in person.
Jennifer Lee, instructed by pdc legal, on behalf of the Respondents.

The following cases are referred to in this decision:

Lloyds Bank Plc v Bowker Orford [1992] 2 EGLR 44
Broadwater Court Management Co Ltd v *Jackson-Mann* Court of Appeal (unreported dated 23 October 1997)

DECISION

Introduction

1. The Appellant appeals from the decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel ("the LVT") dated 23 March 2010 whereby the LVT decided that the service charges payable by the Appellant (as lessee) to the Respondents (as lessors) in respect of the above mentioned premises could properly include costs of a chartered accountant engaged by the Respondents for the preparation of the service charge accounts and of the appropriate certificate. The hearing before the LVT involved various other matters concerning the reasonableness of the service charges payable by the Appellant for the years 2006/7 and 2007/8, but the point regarding the recoverability of an accountant's fees through the service charge provisions is the only point which is raised on this appeal.

2. The LVT decided (in paragraph 10 of its decision) that it was not unreasonable for the Respondents to engage a chartered accountant to prepare the service charge account and the certificate; that the amount charged by the accountant was within the band of reasonableness; and that on the proper construction of the lease the accountant's fees could be included within the service charges. Permission to appeal was granted by the President when he made the following observations:

> "It is clearly arguable that the lease makes no provision over and above the management fee for the costs of preparing management accounts or certifying the amount of the service charge".

It is only this point regarding the proper construction of the lease with which the present appeal is concerned. I am not concerned as to the reasonableness of engaging an accountant or the reasonableness of the fees charged by that accountant. The question remains however as to whether the terms of the lease allow the Respondents to charge the accountant's fees to the Appellant through the service charge provisions. It has been ordered that the appeal proceed by way of review.

3. At the hearing the Appellant (who appeared in person) had produced a helpful skeleton argument and bundle and Miss Lee had also prepared a helpful skeleton argument. Both the Appellant and Miss Lee developed their arguments orally before me. No evidence was called.

Lease

4. The premises at 8 Ulva Road, SW15 contained, so I was told, four flats. The Appellant holds his first floor flat pursuant to a lease dated 18 August 1978 whereby the Respondents' predecessors demised to the Appellant's predecessors the first floor flat at 8 Ulva Road (which was called "the Building") for a term of 120 years from the 25 March 1978 at a ground rent. The reddendum provisions in clause 2 made further provision regarding the payment of service charges:

"AND ALSO PAYING (by way of further and additional rent payable as hereinafter provided) one quarter of the total amount expended by the Lessor in –

(a) …[provision relating to insurance]

(b) carrying out the covenants on its part hereinafter contained in clause 4(3)(a) hereof and one-third of the total amount expended by the Lessor in carrying out the covenants on its part hereinafter contained in clause 4(3)(b) hereof PROVIDED THAT in addition the Lessee shall pay to the Lessor by way of further rent payable as aforesaid by way of a management fee one quarter of the sum equivalent to 15 per cent of the said total amount expended by the Lessor such further and additional rent (hereinafter called "the service charge") being subject to the following terms and provisions:-

(a) The amount of the service charge shall be ascertained and certified annually by a certificate (hereinafter called "the certificate") signed by the Lessor or its agents as soon after the end of the Lessor's financial year as may be practicable and shall relate to such year in manner hereinafter mentioned

(b) The expression "the Lessor's financial year" shall be deemed to mean the period from the First day of April in every year to the Thirty-First day of March or such other annual period as the Lessor may in its discretion from time to time determine as being that in which the accounts of the Lessor either generally or relating to the Building shall be made up

(c) A copy of the certificate for each such financial year shall be supplied by the Lessor to the Lessee on written request and without charge to the Lessee

(d) The certificate shall contain a fair summary of the Lessor's said total amount expended by the Lessor during the Lessor's financial year to which it relates and the certificate (or a copy thereof duly certified by the person to (sic) whom the same was given) shall be conclusive evidence for the purpose hereof of the matters which it purports to certify save for any patent error therein

(e) ….[provision regarding anticipated expenditure].

(f) …. [provision regarding advance payments]

(g) As soon as practicable after the end of each Lessor's financial year the Lessor shall furnish to the Lessee an account of the service charge payable to the Lessee (sic) for that year ….[provision for calculation of balance payable or allowance to be made after giving credit for advance payments]

5. Clause 4 of the lease contained covenants by the lessor with the lessee and clause 4(3)(a) and clause 4(3)(b) (which are the provisions expressly referred to in clause 2(b) set out above) provide as follows –

"3(a) Subject to contribution and payment by the Lessee as hereinbefore provided that the Lessor will –

(i) Throughout the said term repair and keep the exterior of the Building and the approaches to the Building and the roof outer walls main drains gutters and down pipes and structure thereof in good tenantable repair and condition including decorative condition (reasonable wear and tear excepted) and the gutters and down pipes cleared and in good condition and in particular paint such exterior with three coats of good quality paint in every fifth year of the said term where usually painted

(ii) Maintain and keep in good and substantial repair and condition all such gas and water mains storage tanks pipes drains waste water and sewage ducts and electric cables and wiring as may from time to time be used by the lessee in common with other tenants supplying all materials and labour necessary for this purpose and make good at its own expense any damage caused in the course of such maintenance or repairs or as a consequence of failure so to maintain or repair to any property of the Lease

(iii) Pay all existing and future rates taxes assessments and outgoings now or hereafter imposed or payable in respect of the whole of the Building not payable by the Lessee under his respective Lease or under general law

(iv) To provide any other services and to carry out any other works of whatever nature as the Lessor may from time to time deem necessary or expedient for the efficient management of the Building and the garden areas forecourt and footpaths belonging thereto

(b) Subject to contribution and payment by the Lessee as hereinbefore provided that the Lessor will keep the entrance hall staircases and other parts of the Building used in common cleaned and properly lighted and decorated every seven years of the said term"

Appellant's submissions

6. The principal arguments advanced by the Appellant were as follows:

(1) The lease should be construed contra proferentem against the lessor, i.e. against the Respondents. There is no clear and unambiguous provision in the lease entitling the lessor to recover an accountant's fees through the service charge and accordingly the lessor should not be entitled to do so.

(2) The lease requires the lessor (through itself or its agents) to perform certain functions under clause 2, but the costs which the lessor can recover through the service charge provisions are limited to the costs of carrying out the covenants in clause 4(3)(a) and clause 4(3)(b), which do not include reference to these obligations on the lessor contained in clause 2.

(3) As regards the provisions of clause 4(3)(a)(iv) (which I hereafter refer to as "paragraph iv" and which Miss Lee referred to as the sweeping up clause), the Appellant submitted that this must be construed ejusdem generis with the other provisions in clause 4(3)(a) and accordingly should be construed as limited to the

provision of services which were enjoyed at the Building or in the garden areas forecourts and footpaths, rather than services in the nature of professional expertise in dealing with the lessor's paperwork. He submitted that the decision of Mr David Neuberger QC (as he then was) in *Lloyds Bank Plc v Bowker Orford* [1992] 2 EGLR 44 showed that the expression "total cost to the lessor …. of providing the services" is a wide one but was limited in that case to the costs of employing managing agents to organise and supervise the provision of services rather than extending for instance to costs of collecting rent. He submitted the paragraph iv costs could not include the expenses in administering the lease.

(4) The Appellant drew attention to the fact that the lease makes provision for the payment of a 15% management charge. It is through this management charge that the Lessor is to be paid for its costs of administering the lease, including the employment of an accountant if it chooses to employ an accountant to perform tasks under clause 2 which it would be entitled to perform itself if it so chose.

Respondent's submissions

7. Miss Lee commenced by submitting that this Tribunal should be slow and cautious before overturning the LVT's decision and that the LVT's interpretation of the lease was within its area of discretion. She submitted this Tribunal should not overturn the LVT's decision unless there is a very clear reason for doing so. However in answer to questions from me Miss Lee said she did not argue that this Tribunal should refrain from substituting its own views as to proper construction of the lease for those of the LVT if this Tribunal considered that the LVT's construction was wrong. For the avoidance of doubt I should record that I would not have been able to accept any submission by Miss Lee that I should approach the question of the proper construction of the lease by asking not what was the proper construction but asking instead whether the LVT's construction was outwith the range of reasonable constructions which could properly arguably be placed on the lease. It is for this Tribunal to construe the lease.

8. Miss Lee argued that the sweeping up clause in paragraph iv was sufficiently wide, especially when coupled with the wording "the total amount expended by the Lessor" in the introduction to Clause 2(a), to allow the lessor to recover an accountant's fees. She submitted that a "purposive approach" should be adopted and (as I understood her) that the purpose to have in mind in this purposive approach was a purpose which involved the lessor being able to pick up through the service charge provisions the totality of its expenditure in running the Building.

9. As regards paragraph iv Miss Lee drew attention to the width of the words used:

> "To provide any other services… of whatever nature as the Lessor may from time to time deem necessary or expedient for the efficient management of the Building and the garden areas forecourt and footpath belonging thereto."

Miss Lee submitted the Tribunal should apply a broad purposive approach which should lead to the conclusion that reading clause 2 and clause 4(3)(a) together the costs of an accountant's fees which are incidental and necessary to the computation of service charge should be

recoverable from the lessees and not borne by the lessor. She submitted that the provision of accurate and properly presented accounts was a necessary and expedient step in the efficient management of any leasehold building and that therefore the lessor could properly and reasonably conclude that it was necessary or expedient, in order properly to manage the Building, that an accountant should be engaged for the preparation of the accounts. Accordingly the provision of this service (namely the making available of accounts prepared by a chartered accountant) fell within paragraph iv. She submitted that the proper recovery by the lessor of service charges is in the long run of crucial importance to the proper management of the Building and that the provision of accounts prepared by a chartered accountant assists in the proper management of the Building because without such professionally certified accounts the recovery of service charges would be more difficult. The foregoing therefore supports the argument that the provision of this service (namely the making available of accounts prepared by a chartered accountant) falls within paragraph iv.

10. I asked Miss Lee as to whether there was any distinction in kind between the lessor deeming it necessary or expedient for the efficient management of the Building etc to engage professional managing agents on the one hand and the lessor deeming it necessary or expedient for the efficient management of the Building etc to engage an accountant to prepare the accounts and certificate on the other hand. I suggested to Miss Lee that it might be thought difficult to argue that under paragraph iv the lessor could properly deem it necessary or expedient etc to engage professional managing agents and then to recover the whole of the costs of such managing agents through the service charges (on the basis that their engagement fell within paragraph iv) and then, in accordance with the terms of clause 2(b), to charge in addition a management fee of 15% based on this total amount expended by the lessor, being an amount which would have been swelled by the costs of engaging the managing agents. Miss Lee accepted that the lessor could not properly argue that the engagement of professional managing agents involved the provision of a service within paragraph iv for which the lessees could be charged, with the further 15% on top for management, but she submitted that managing agents provide a different service from an accountant and that paragraph iv is wide enough to allow the costs of an accountant to be included in the service charges.

11. Miss Lee drew attention to clause 2(b)(c) which requires that a copy of the certificate for each financial year is to be provided by the lessor to the lessee on written request without charge. The Appellant no longer pursued an argument that this amounted to an express provision that there was to be no charge for the preparation of the accounts and the certificate – he accepted that this provision merely made clear that there was to be no charge for supplying a copy of the certificate. However Miss Lee argued that this provision in Clause 2(b)(c) was a positive indication that there was power to charge for the preparation of the certificate in the first place – otherwise why is it necessary expressly to provide that a provision of a copy of the certificate is not to be charged for. By expressly providing that the copy is not to be charged for the clause implies that the preparation of the original certificate can be charged for.

12. Miss Lee referred to the Court of Appeal decision in *Broadwater Court Management Co Ltd* v *Jackson-Mann* dated 23 October 1997 (a transcript of which she provided but which may otherwise be unreported). She drew attention to the provisions of the Fourth Schedule to the lease which was there under consideration and pointed out that, even though there was no express provision for the recovery of administration costs, the court held that the provisions were sufficiently wide to cover the administration costs necessarily involved in ascertaining

and computing the amount of the service charge. Miss Lee submitted that the decision in the *Broadwater Court* case showed that a broad and purposive instruction should indeed be given to the provisions of the lease in the present case.

13. Miss Lee then sought to advance an alternative argument, supposing that her primary argument based upon paragraph iv was wrong. She submitted that having regard to the expression "the total amount expended by the Lessor" in the introductory words to clause 2(a) the lease should be construed as entitling the lessor to recover all of its reasonable costs in running the Building.

Conclusions

14. I deal first with Miss Lee's alternative argument mentioned in the immediately preceding paragraph. This cannot be correct. The words of the lease require the lessee to pay a proportion of the total amount expended by the lessor in doing certain things. These things are then set out. After the reference to insurance (not presently relevant) the things which the lessor can charge the total amount expended in doing are carrying out the covenants on its part contained in clauses 4(3)(a) and (b). It is common ground that if the engagement of an accountant does not fall within paragraph iv (i.e. within clause 4(3)(a)(iv)) then it does not fall within any of the other provisions in clauses 4(3)(a) or (b). Accordingly if Miss Lee's primary argument is wrong and paragraph iv does not cover the engagement of an accountant, the result must be that the cost of engaging an accountant cannot be included in the calculation of the service charge. This is simply because the service charge provisions allow for the recovery of the costs of carrying out the covenants in clauses 4(3)(a) and (b) and if the costs of an accountant do not fall within paragraph iv then they do not fall within clauses 4(3) (a) or (b) and the lessee cannot charge the costs thereof.

15. The crucial question therefore is whether the engagement of an accountant to prepare and certify the accounts can be said to be the provision of –

> "…. any other services …. of whatever nature as the Lessor may from time to time deem necessary or expedient for the efficient management of the Building and the garden areas, forecourts and footpaths belonging thereto".

16. In my judgment the engagement of an accountant and the provision of accounts prepared and certified by an accountant does not constitute the provision of services within paragraph iv. My reasons for so concluding are as follows.

17. This is a case where a management fee is expressly made payable calculated as 15% of the total amount expended by the lessor on insurance and in complying with the covenants in clause 4(3)(a) and (b). It is in my view clear that the lessor is not entitled to argue that the engagement of professional managing agents, however sensible or desirable that may be for the efficient management of the Building etc, is something which falls within paragraph iv and can therefore be charged for through the service charge. Were the position otherwise one would get to the remarkable result that the lessor could engage managing agents to perform all of its tasks under the lease and could argue that the provision of the managing agents' services in this regard fell within paragraph iv and that therefore the costs of the managing agents were part of

the "total amount expended" for the purpose of calculating the service charge – and the lessor would then be entitled through the express provisions of the lease to add a 15% management fee on top. In my judgment paragraph iv must be construed on the basis that the provision of professional management services for the efficient management of the Building is not the type of "other service … of whatever nature" as is referred to in paragraph iv. There is express provision in clause 2 for a management fee. Paragraph iv is not therefore sufficiently wide as to allow the provision of the services of managing agents to come within it. If the provision of the services of managing agents does not fall within paragraph iv I see no reason to reach a different conclusion in respect of the provision of the services of an accountant insofar as the lessor chooses to employ an accountant to perform a function which otherwise the lessor would have to perform itself in managing the Building.

18. The lease imposes certain express obligations on the lessor in the covenants in clause 4(3)(a) and (b). It is the total amount expended in performing these obligations (and in effecting insurance) which can be charged through the service charge provisions. However the lease lays certain further express obligations on the lessor, for instance the obligation in clause 2 to ascertain and certify the amount of the service charge and the furnishing of accounts to the lessee. The cost of performing the obligations under clause 2 is conspicuously not one of the costs which can be charged through the service charges. The Respondent's argument involves reading clause 2 as though, instead of allowing the recovery of the total amount expended by the lessor in insuring and in carrying out the covenants in clauses 4(3) (a) and (b), the lease instead provided that the lessor could recover the total amount expended in complying with all of its obligations under the lease. However the lease does not so provide.

19. Also bearing in mind the fact that clause 2 imposes certain express obligations on the lessor I conclude that paragraph iv, when speaking of the provision of any other services of whatever nature as the lessor may from time to time deem necessary or expedient for the efficient management of the Building etc, cannot properly be construed as extending to steps taken by the lessor to perform its contractual obligations under clause 2.

20. Also the wording of paragraph iv is in my judgment directed towards services which are actually enjoyed by the lessees as the fruits of "the efficient management of the Building and the garden areas, forecourts and footpaths belonging thereto." The lessees would consider that, for instance, the sweeping up of fallen leaves in the garden to be such a service, but the lessees could not reasonably be expected to accept that the dealing with accounting problems lying on the lessor's desk was such a service.

21. I do not consider the Respondents' arguments are assisted by Miss Lee's reference to the *Broadwater Court* case. In that case there was no provision in the lease for the recovery by the lessor of a management fee. It may also be noticed that an argument was there advanced that it must have been in the contemplation of the parties at the date of the grant of the lease that the freehold would be transferred to a management company which would perform the landlords' obligations in return for the payment of the tenants' contributions – the argument was that if such a scheme is to work then it is necessary that the tenants should contribute sufficiently to cover all the proper outgoings of the company which has no other source of funds. The fact that in those circumstances it was held on the wording of that lease that the administration costs necessarily involved in ascertaining and computing the amount of the service charge were recoverable does not assist the Respondent's argument that on the terms of

the present lease (which has an express provision for a 15% management fee) the Respondents can do likewise and can include an accountant's fee within the relevant "total amount expended" and can then charge a 15% management fee on top.

22. Miss Lee's argument based on clause 2(b)(c) of the lease (see paragraph 11 above) does not undermine the above conclusions. All that clause does is to lay down that the lessor cannot make a charge to the lessee for supplying a copy of the certificate. The clause makes no provision as to what is to be included within the "total amount expended" – but other provisions in the lease (analysed above) make express provision for this.

23. In summary I conclude that under the lease the Respondents have certain obligations which are not embraced within clauses 4(3) (a) and (b) being obligations which the lease contemplates the Respondents will perform at their own expense in return for the management fee. One of these obligations is the preparation of the accounts and the appropriate certificate. The lease makes no provision for the engagement of an accountant. It is of course open to the Respondents to choose to use an accountant, rather than to prepare the accounts themselves, in just the same way as it is open to the Respondents to employ managing agents, rather than to manage the Building themselves, but if the Respondents do so they must pay from their own pockets for such an accountant or such managing agents. This is all part of the costs of managing the Building for which the Respondents are entitled to their management fee.

24. In the result therefore I allow the Appellant's appeal against so much of the LVT's decision as found that the Respondents were entitled to include the fees of the chartered accountant as part of the service charge costs.

Dated 13 July 2011

His Honour Judge Nicholas Huskinson