UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2012] UKUT 71 (LC)
UTLC Case Number: LRX/121/2010

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT– lease construction – service charges – whether "better use and enjoyment" includes collection of service charges – appeal dismissed

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

BETWEEN TWENTY TWO CLIFTON GARDENS LIMITED Appellant

and

THAYER INVESTMENTS SA Respondent

Re: Flat 1, 22 Clifton Gardens, London W9 1DT

Before: Her Honour Judge Walden-Smith

Sitting at: 43-45 Bedford Square, London WC1B 3AS
on
27 February 2012

James Homes-Milner instructed by William Heath & Co on behalf of the Appellant
Richard Clegg instructed by Iliffes Booth Bennett on behalf of the Respondent

The following cases are referred to in this decision

St Mary's Mansions v Limegate [2003] 1 EGLR 41
Stella House v Mears [1989] 1 EGLR 41
Morgan v Stainer [1993] 2 EGLR 73
Iperion Investment Corporation v Broadwalk House Residents [1995] 2 EGLR 47
Forcelux Limited [2004] LT Ref LRX/33/2003
Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896

DECISION

Introduction

1. This is an appeal by way of review from the decision of the Leasehold Valuation Tribunal for the London Assessment Panel dated 21 July 2010. Permission to appeal was refused by the LVT but granted by the President on 8 December 2010. In granting permission to appeal, the President made the observation that the only point in issue appeared to be whether the solicitors and surveyor instructed for the purpose of the proceedings before the LVT were agents within the provisions of paragraph 12 of Part IV of the Schedule to the Lease relating to Flat 1, 22 Clifton Gardens, London W9 1DT ("the Lease"). As the matter unfolded, both in the respective Statements of Case and Skeleton Arguments of both the Appellant and Respondent, and in oral submissions before me, both parties agreed that the issues before the Upper Tribunal (Lands Chamber) (hereinafter "the Tribunal") covered a wider area of construction of paragraphs 10, 11 and 12 of part IV of the Schedule to the Lease. By agreement between the parties, the hearing before me and this decision deals with that wider area of construction.

2. The issues between the parties, therefore, is the construction of paragraphs 10, 11 and 12 of part IV of the Schedule to the Lease and whether those provisions should be construed as including the Appellant solicitors' costs and surveyors' fees of the LVT proceedings against the Respondent tenant. It is a relatively short point of construction and I was greatly assisted by the focused submissions of Counsel for both the Appellant landlord and the Respondent tenant. An application for an order pursuant to the provisions of section 20C of the Landlord and Tenant Act 1985 was made before me should the Appellant succeed in its appeal. That application was noted as having been made and adjourned pending the outcome of this matter.

The Lease

3. 22 Clifton Gardens, London W9 ("22 Clifton Gardens") is a block of 5 flats. At the time of the demise of Flat 1, 22 Clifton Gardens pursuant to the Lease dated 26 May 1995 ("the Lease"). The freehold owner of 22 Clifton Gardens was Telco Estates Limited. The Lease of Flat 1 is between Telco Estates Limited of the one part and Anthony Stephen Japhet of the other, the predecessor to the Respondent company, Thayer Investment SA ("the Respondent"). Flat 1 comprises the garden and raised ground floors of 22 Clifton Gardens. The fraction of the service charge to be paid by the Respondent is 31.19%. This is a reflection of the size of Flat 1, which I understand includes 4 bedrooms and a rear patio garden.

4. The lessor is the Appellant, Twenty Two Clifton Gardens Limited ("the Appellant"). The Appellant was originally a party to the Lease as the management company but it subsequently acquired the freehold. Each lessee of the five flats is a member of the Appellant. The Respondent's leasehold interest was registered on 10 October 2002 and on 25 October 2002, the Respondent was registered as a shareholder of the Appellant.

5. The appeal is brought against the determinations by the LVT made on 21 July 2010 that neither the legal costs nor the costs of the expert's report obtained for the purposes of the proceedings before it are recoverable by the Appellant as service charges pursuant to the terms of the Lease.

6. I have been given details of the figures involved in this matter and I record that the legal costs of the LVT proceedings included within the service charge accounts for the year ending March 2010 were in the sum of £7,922 of which the Respondent's share (at 31.19%) was £2,470.87 and that the expert's report was £2820 of which the Respondent's share (at 31.19%) was £879.56. It is not relevant to my determination as to how much of the claim was permitted or disallowed by the LVT. I have treated the figures given to me as useful background information.

7. The issue for my determination is whether, on a proper construction of paragraphs 10, 11 and 12 of part IV of the Schedule to the Lease, the Appellant is entitled to recover against the Respondent the costs of the solicitors (and counsel) and the expert surveyor instructed for the purpose of the LVT proceedings. These paragraphs set out the obligations owed by the management company to the tenant of the subject Lease under clause 7 of the Lease. The Appellant contends that they also include obligations to the Lessor but, for the reasons set out herein, I do not accept that contention.

8. These paragraphs provide the following:

> "10. The Company shall of its own volition or if requested by the Lessee take all reasonable steps to enforce the observance and performance by the Lessee of other flats in the block of the covenants and conditions in the leases of the other flats which fall to be observed and performed by the Lessee.
>
> 11. The Company may provide such other services as it shall in its reasonable discretion deem necessary for the better use and enjoyment of the Property by the Lessee and other occupiers of the Building.
>
> 12. The Company may employ and remunerate such staff or agents in the performance of its obligations hereunder as it shall think fit."

The Submissions

Paragraph 10

9. The Appellant's primary contention with respect to paragraph 10 is that it is poorly drafted and ambiguous. The "Lessee " is defined in the Lease as being the Person or Company whose name and address is set out in paragraph (b) of Part V of the Schedule to the Lease and is "hereinafter called the Lessee". The Lessee is therefore defined as being the owner of the particular flat in the block.

10. It is the Appellant's submissions that paragraph 10 of Part IV can only be sensibly construed if the words "and the lessees" are added into paragraph 10 along with the words "or the lessees of such other flats", so that paragraph 10 would read: "The Company shall of its own volition … take all reasonable steps to enforce the observance and performance by the Lessee *and the lessees* of other flats in the Block of the covenants and conditions in the leases of the other flats which fall to be observed and performed by the Lessee *or the lessees of such other flats."* The italicised words are the additional words proposed by the Appellant.

11. The Appellant contends that the paragraph cannot sensibly be taken to exclude the defaulting tenant from responsibility to contribute to costs which are expended on enforcement against that tenant but which fall out with the scope of clause 2(5). I should note that the Appellant has County Court proceedings on foot which do claim costs under clause 2(5) of the Lease which costs are disputed as being recoverable by the Respondent. I do not concern myself with the arguments on that point as that is a matter to be determined in a different jurisdiction.

12. In construing the Lease it is necessary to consider the situation when the Lease was entered into. At that time, the management company and the Lessor were two separate entities. Paragraph 10 contains obligations on the part of the management company for the benefit of the lessees: *"The Company shall of its own volition or if requested by the Lessee …".* It does not contain any obligations on the part of the management company to *"take all reasonable steps to enforce the observance and performance …"* on behalf of the Lessor as the Lessor is a party itself and could take any steps it wished to against the tenants. I do not accept the Appellant's contention that the management company also has an obligation to take steps on behalf of the Lessor. It is by virtue of the provisions of clause 7 of the Lease that the Company covenants with the Lessee to perform and observe the obligations and each of them set out in part IV of the Schedule to the Lease.

13. It is the Respondent's case that paragraph 10 is clear and unambiguous. Paragraph 10 obliges the management company, either of its own volition or by request of the Lessee (that is the owner of the flat) to take all reasonable steps to enforce the observance by the lessees of other flats in the block of the covenants and conditions in the leases of the other flats which fall to be observed and performed by the Lessee. It is said that the only matter that could potentially give rise to confusion is the use of the upper case "L" for "Lessee" which, according to the preamble and the definitions in part V of the Schedule is a reference to the Lessee of the particular block.

14. In my judgment, paragraph 10 is unambiguous. The use of the upper case "L" rather than the lower case "l" in paragraph 10 is plainly unfortunate given the definition of "Lessee". However, it is clear from a reading of the paragraph that the reference is to the "Lessee of other flats in the block", not the owner of the subject flat. To add the additional words suggested on behalf of the Appellant is unnecessary to give clear meaning to the paragraph and amounts to a rectification of the agreement. There is nothing to suggest that the parties to the Lease did not intend what is set out, namely that the costs of carrying out the enforcement falls upon the non-defaulting tenants, and in my judgment there is no basis for rectification of the paragraph. It is important to give words their natural and ordinary meaning (see, for example, Lord Hoffman in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896), and the words "Lessee of other flats in the block" do have a natural and ordinary meaning. The only source of confusion is the use of the upper case "L" however, the use of the upper case "L" is, as has been pointed out by Counsel for the Respondent, to be seen in other provisions in the Lease. In particular, in clause 3 there is reference to *"the Lessees of the remainder of the Block the Lessee HEREBY COVENANTS with the Lessor the Company and the Lessee for the time being of the other parts of the Block and with each of them …"*. Quite clearly the reference to "Lessee … of other parts of the Block" is just that and not the owner of the subject Lease. Similarly, in clause 4(2) there is reference *"that if so required by the Lessee will take all proper and reasonable steps to enforce the same against a Lessee of a Lease of such other part of the Block…"* and clause 5(1) *"In case at any time during this demise any dispute shall arise between the Lessee and any other of the Lessees…"*. These examples show that the Lease has been drafted in such a way that reference to "Lessee" or "Lessees" does not necessarily mean the "Lessee" under the subject Lease (i.e. the owner as per the definitions clause) and that the lower and upper case "L" are used interchangeably when reference is made to lessees under Leases other than the subject Lease. Additionally, in paragraph 1 there is reference to *"… all other Lessees of parts of the Block"* and, while there are some references to "other occupiers of the block" I could find no use of "lessee" with a lower case "l" when reference to lessees of other parts of the block of flats is referred to.

15. Consequently, in my judgment, the obligation at paragraph 10 of Part IV of the Schedule to the Lease is to enforce the covenants and conditions in leases other than the subject Lease. There is no such obligation to enforce in the subject Lease. The Appellant cannot therefore rely upon paragraph 10 as providing the basis for expending monies to enforce against the Lessee of the subject Lease and the costs recoverable against the Respondent do not, therefore, include the solicitor and surveyor's costs expended in bringing the LVT proceedings against the Respondent.

Paragraph 11

16. The Appellant contends that the provision that *"The Company may provide such other services as it shall in its reasonable discretion deem necessary for the better use and enjoyment of the Property by the Lessee and other occupiers of the Building"* includes the costs of any surveyor or solicitor employed in the course of the LVT proceedings against the Respondent as bringing those proceeding was for the better use and enjoyment of the property. It is contended by the Appellant that the failure of a tenant to pay his service charge, in this case 31.9% of the total amount, is (or is potentially) disruptive to the good management and maintenance of the building and places an unfair burden upon the other tenants. It is said that

"use and enjoyment" is not limited to the quality of the fabric of the building but is also concerned with the potential disturbance of legal rights and the relationship between tenants.

17. In *St Mary's Mansions v Limegate* [2003] 1 EGLR 41 Ward LJ, giving the judgment of the Court of Appeal held that the provision: "The costs of all other services which the lessor may at its absolute discretion provide or install in the said Buildings for the comfort and convenience of the lessees" did not cover the pursuit of legal proceedings. The Appellant contends that the words of paragraph 11 are wider in this Lease, however, as with the decision of Taylor LJ in *Stella House v Mears* [1989] 1 EGLR 65, where he said "For my part I should require to see in clear and unambiguous terms before being persuaded that that result [charging legal fees as part of the service charge] was intended by the parties" and Peter Gibson LJ in *Iperion Investments Corporation v Broadwalk House Residents Limited* [1995] 2 EGLR 47, where he held that legal costs did come within the cost of the management of the property and were therefore covered by particular provisions of that lease, the cases turn upon the precise terms of the lease and, as Counsel for both the Appellant and the Respondent properly acknowledged, do not assist in any particular way in construing the terms of this Lease.

18. I was also referred to the decision of Mr David Neuberger QC (as he then was) sitting as a Deputy High Court judge in *Morgan v Stainer* [1993] 2 EGLR 73 but that again turns on the particular wording in that lease and I adopt the approach taken by HHJ Rich QC in *Forcelux Limited* [2004] LT Ref LRX/33/2003 that the construction of the wording in a lease very much turns upon the particular wording; previous authorities giving little or no assistance as to the correct construction.

19. The provisions "such other services" and "in its reasonable discretion deem necessary" in paragraph 11 are extremely widely worded and I accept the Appellant's submissions to that effect. However, I am unable to accept the proposition that paragraph 11 can provide a means of recovering the LVT costs against the Lessee of the subject Lease when the same are (as I have found) excluded by virtue of the provisions of paragraph 10. Paragraph 11 deals with such "other services" which, in my judgment, must be services other than those already referred to in paragraphs 1 to 10 of Part IV of the Schedule to the Lease and therefore does not include those enforcement matters dealt with expressly in paragraph 10.

20. Further, I accept the Respondent's submissions that other services that are deemed "necessary for better use and enjoyment of the Property by the Lessee" do not include the bringing of LVT proceedings. As Counsel for the Respondent has said, the collection of service charges is a by-product of the provision of the services for the better use and enjoyment of the property; it is not a service which in itself enables the tenant to better enjoy the property. The Respondent relies upon the decision of the Court of Appeal in *St Mary's Mansions v Limegate* [2003] 1 EGLR 41 and, while the clause under scrutiny had somewhat different wording: *"The cost of all other services which the lessor may at its absolute discretion provide or install in the said buildings for the comfort and convenience of the lessees"* the finding that pursuing legal proceedings did not fall within that wide discretion is one I adopt. As is said by Ward LJ *"It strains the language to impossible limits.* The ordinary and natural meaning of the clause is to allow the lessor to charge for other services it provides or installs in the building. It deals with physical facilities, not legal advice". I find, in this

case, that the costs incurred in pursuing proceedings in the LVT with the instruction of a surveyor and a solicitor are not matters which are "necessary for better use and enjoyment of the Property by the Lessee". The provision in paragraph 11 is to cover any other services deemed necessary for the better physical use and enjoyment of the Property otherwise not covered in part IV.

21. Consequently, paragraph 11 does not provide the basis for the Appellant recovering the costs of the solicitor and surveyor costs in the LVT proceedings against the Respondent.

Paragraph 12

22. It is accepted by the Appellant, quite properly, that paragraph 12 of Part IV of the Schedule to the Lease adds nothing to the argument. If paragraphs 10 and 11, as I have found, do not allow for the collection of service charge against the Respondent for the proceedings in the LVT, then paragraph 12 does not assist.

23. Paragraph 12 simply provides that insofar as there is an obligation contained in paragraphs 1 to 11 of the Part IV, the Appellant company may employ and remunerate such staff and agents as it thinks fit. That would, in my judgment, include employment of solicitors and surveyors if that was appropriate. However, as paragraphs 10 and 11 do not entitle the Appellant company to recover the LVT costs, the provision contained in paragraph 12 does not assist the Appellant.

Conclusion

24. For the reasons set out above, I dismiss this appeal.

Dated 7 March 2012

Her Honour Judge Karen Walden-Smith