FIRST - TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**BIR/37UF/LIS/2022/0011**
Property	:	**15 The Courtyard, Berry Hill Lane, Mansfield, NG18 4FZ**
Applicant	:	**Helen Jones**
Respondent	:	**(1) Blackthorne (Midlands) Limited (2) Berry Hill Hall (Mansfield) Management Company Limited**
Type of Application	:	**27A(3) Landlord and Tenant Act 1985** **20C Landlord and Tenant Act 1985** **Schedule 11 paragraph 5A Commonhold and Leasehold Reform Act 2002**
Tribunal Members	:	**Judge C Kelly (chairman)** **I D Humphries B.Sc.(Est.Man.) FRICS**
Date of Decision	:	**26 September 2022**

DECISION

Summary

1. Miss Helen Jones, the applicant ("the Applicant"), brought proceedings before the tribunal seeking clarity as to her obligation to make payment under the service charge the sums incurred in relation to expenditure for properties not relating to her specific building. Additionally, she made an application section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act") seeking to limit the respondent landlord's costs from being recovered by way of the service charge.

2. It is this Tribunal's decision that:

   2.1. The absence of any contribution towards the service charge by the First Respondent landlord for any properties that it owns on the development and which remain in its legal ownership does not alter the payability or reasonableness of the service charges levied in this case;

2.2. The applicant's application for an order under s.20C of the 1985 Act succeeds, to the limited extent that the Tribunal directs that any recovery of the Second Respondent's costs of these proceedings may only be defrayed against the general body of leaseholders and not against the Applicant in whole although she shall be liable for her proportion in line with the general percentages applied for all other service charge expenses; and

2.3. The First Respondent is required to reimburse the Applicant the sum of £300 in respect of the issue and hearing fees paid to commence the proceedings before the Tribunal, such sum to be paid by 4pm on 14 October 2022.

Detailed reasoning

3. The Applicant owns Apartment 15, The Courtyard, Berry Hill Lane, Mansfield, Notts NG18 4FZ ("the Apartment"). The Tribunal did not inspect the Apartment of the development on which it stands, the parties recognised and proceeded on the basis that:

   3.1. the Apartment is within one purpose-built block called the Courtyard, comprising 15 other apartments, accessible by two separate entrances; and

   3.2. there are a number of other buildings within the development, such as The Stables, Berry Hill Hall, The Clocktower and The Hayloft, all of which, the Second Respondent undertakes the provision of services for and collects in service charge.

4. The respondents to these proceedings are (a) Blackthorn (Midlands) Limited ("the First Respondent"), which is the landlord/freehold owner of the entire development, comprising the buildings referenced above, and (b) Berry Hill Hall (Mansfield) Management Company Limited ("the Second Respondent"), the leaseholders management company.

5. The lease purchased by the Applicant was initially entered into between (a) the First Respondent, (b) the Second Respondent and (c) Oldham Broadway Developments Limited ("Oldham") and is dated 3 August 2009 ("the Lease"). Oldham had, we understand, sold its interest under the Lease to the Applicant.

6. The Second Respondent had appointed Compass Block Management as its managing agent to deal with the day-to-day management of the development, amongst which includes, amongst other things, the provision of services to the development and the collection of service charge. Mr Jeremy Chick, director of the managing agent, represented the Second Respondent in these proceedings.

7. The Applicant had, in her application before the Tribunal, identified that her challenge related to the service charge years 2017 to 2021. The Applicant described, in her Application Notice, the question that she wished the tribunal to determine in the following way:

   "I would like the tribunal to determine if it is fair and reasonable for service charges which do not relate to the dwelling to which my lease relates to be apportioned to me (and each and every other leaseholder)."

8. No other leaseholders joined in these proceedings.

9. The essence of the Applicant's concern is that she, together with the other leaseholders, were being asked to contribute towards service charge expenses in respect of the development which

contained a number of properties still owned by the landlord, which had not been sold off to third parties. The Tribunal was not provided with any evidence of the factual position as to the state of which properties, or how many of them, might still remain the ownership of the First Respondent. The Tribunal thus proceeded on the basis that there were some properties that remained in the ownership of the First Respondent to address the principal issue, which following some clarification being obtained during case management, was recorded in the directions order of Regional Judge Jackson of 1 April 2022 in the following way:

> *"The Applicant seeks a determination in relation to the apportionment to the Applicant and other leaseholders of the shortfall in the landlord's contribution towards service charges of unsold apartments 2017 to 2022 ("the Issue").*
>
> *It is said that these apartments are either empty or used by the Landlord's contractors, employees and sales agents. The Applicant's case is that the contribution made towards service charges by the Landlord is "nominal" with the shortfall being apportioned amongst the long leaseholders at the property".*

10. The Lease contains the following provisions:

> *"4. The Lessee HEREBY COVENANTS separate governance with each of them and the Less or and the Company that the Lessee will throughout the said term:*
>
> *4.1 Pay rent hereby reserved (if demanded) at the time and in the manner which the same is hereby made payable*
>
> *4.2 To pay the Interim charge and the Service Charge to the Company at the times and in the manner provided in the Fourth Schedule hereto both such charges to be recoverable in default is rent in a rear…"*
>
> *THE FOURTH SCHEDULE*
>
> *"1. In this Schedule the following expressions have the following meanings respectively:*
>
> *1.1 "Total Expenditure means all costs and expenses whatsoever incurred by the Company in any Accounting Period. In carrying out its obligations under Clause 5 of this Lease…"*
>
> *…*
>
> *"The Service Charge means such percentage of the Total Expenditure as is specified in paragraph 5 of the Particulars such other percentage as may be notified to the lessee by the less sore all the Company pursuant to Clause 10 of this Schedule…"*

11. The Particulars as referred to in clause 1.1 of the Lease, are set out at the start of the lease and identify that the service charge contribution to be made by the Applicant of the Total Expenditure incurred on the development will be:

> *"6.84% or such percentage from time to time determined pursuant to clause 10 of the Fourth Schedule."*

12. Clause 5 of the Lease sets out the obligations that the Second Respondent is to comply with, in relation to which, it may incur expenditure and recover the same by way of the service charge provisions. The clause 5 obligations include:

> *"5.1 insure and keep insured the structure of the Building and all other buildings on the Estate and all common parts of the Estate…*
>
> *5.2. Take all reasonable steps to maintaining keeping good and substantial repair and condition:*
>
> *5.2.1 the structure (except for the glass in both Windows and doors forming part of the demise premises) of the Building and all other buildings on the Estate and security gates main entrances stairways lifts and passages of the Building and all such other buildings…"*

13. The First Respondent, who appeared by counsel, argued:

    13.1. that whilst the tribunal had jurisdiction to determine the reasonableness of service charges by virtue of section 27A(1) the Landlord and Tenant Act 1985 ("the 1985 Act"), it must also take into account all the relevant circumstances that exist as at the date of the hearing in a broad, common-sense way giving weight as it thinks right to the various factors in play to determine whether the charges reasonable;

    13.2. that there are two strands to a reasonableness test, being that the expenses must be (a) reasonably incurred and (b) the works or services to which they relate must be of a reasonable standard (s.19 of the 1985 Act);

    13.3. that there was no obligation upon the landlord to contribute towards service charge absent some agreement to do so (and none existed in the Lease or in any enforceable agreement) and that there was no basis upon which a term could be implied into the Lease in this that would recognise such an obligation to contribute towards the service charge with the other leaseholders.

14. There was no dispute that the Tribunal had an ability to alter the level of contribution of any specific group of tenants insofar as it was exercising its s.27A jurisdiction, given the Court of Appeal's decision in *Avon Ground Rent GP Ltd -v- Williams*[1].

15. It was recognised and accepted by the parties that the obligations to carry out services for the benefit of the development overall, rests with the Second Respondent residents management company, and not the First Respondent landlord. The leaseholders on the estate are members of the Second Respondent and become such on the initial acquisition of their proprietary interests in any lease assigned to them.

16. The difficulty with this tripartite arrangement recorded in the Lease (and the leases generally) is that the Second Respondent is only able to obtain funding for the provision of such services from its leaseholder members, whether pursuant to the terms of the leases by way of service charge or by way of a capital call under the shares that they each own as members of the Second Respondent. Yet, the landlord retains the freehold ownership, without any obligation to undertake the day-to-day management activities on the estate, with all expenses being incurred

[1] [2021] EWCA Vic 26; it is noted that the parties in this matter have been granted permission to appeal and the matter is pending before the Supreme Court. Nevertheless, it is unlikely that the outcome of the decision in *Aviva Investors* will have any bearing upon the correctness of the decision in these proceedings.

by the Second Respondent for its members. Accordingly, the protections that are given under the plethora of legislation in this area are of limited effect, given that in reality, services need to be undertaken and paid for and there is only one realistic pot from which the monies can come – the contributions received from leaseholders obtained via (usually) service charge. This Tribunal is concerned only with the payability and reasonableness of service charges.

17. Given, therefore, that the obligations arise upon the Second Respondent by reason of the terms of the Leases entered into between it and the leaseholders on the development, the starting point, is to query what liability exists for the landlord to contribute towards the expenses incurred by the Second Respondent performing the services on the development.

18. The First Respondent took the position that absent an express term in the Lease between it, the Second Respondent and the various leaseholders, that there was no obligation whatsoever point to make any contribution at all. Essentially, the Applicant considers that approach to be unfair, given that the First Respondent still benefits to some extent from the use of the properties, a number are we understand used for storage and as offices.

19. Mr Jeremy Chick, for the Second Respondent, gave evidence to the Tribunal that, in his experience, this was a highly unusual scenario, where a landlord that had failed to sell properties and which therefore remain within its ownership did not contribute at all towards the estate expenditure via the service charge. This accords with the Tribunal's own experience of such matters. However, there is a difficulty in extrapolating from some broad industry practice or experience a legal obligation specific to the issues in this case. Certainly, however, what is standard industry practice, may go some way to assisting in determining what ought to be payable when resolving vague or difficult legal concepts, or indeed in determining what are reasonable expenses incurred, their amount and the standard of such works or services.

20. The Applicant was, perhaps unsurprisingly being in person and without the benefit of representation, unable to advance any legal authority that might provide some assistance to her in this case to seek to argue that an obligation exists upon the First Respondent to contribute towards the development's service charge. The First Respondent was unable to identify any we were told, perhaps save for the prospect of an argument that there might be said to be an implied term in the Lease which required the First Respondent to contribute. The Second Respondent, not being legally qualified, was unable to identify any legal basis upon which it could be said any obligation existed for the First Respondent to contribute.

21. The Tribunal has equally been unable to identify any specific basis upon which an obligation can exist alongside the Lease in this case to compel the First Respondent to contribute to the expenditure incurred by the Second Respondent in discharging its obligations under the Lease for which it is entitled to collect service charges.

22. Consideration was given to the possibility of implying a term into the Lease, tentatively along the lines that the First Respondent must contribute a reasonable proportion of the service charge. But, there are, as the Tribunal was reminded by the First Respondent, only limited grounds upon which it can find the existence of an implied term. The legal authorities have identified the following conditions which must be met before the proposed term can be implied; the proposed term must:

    be reasonable and equitable[2];

[2] *BP Refinery (Westernport) Pty -v- Shire of Hastings (1978)*

be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it[3];
be so obvious it goes without saying[4];
be capable of clear expression[5]; and
not contradict any express term of the contract.[6]

23. It is right to note that only the requirement for such a term to (a) give business efficacy and (b) be obvious, were cited to us in argument by the First Respondent. These requirements alone are not, in the Tribunal's judgment, met. It cannot be said that it was so obvious that the First Respondent was obliged to contribute and that it was necessary for it to do so in order to give business efficacy to the Lease.

24. The Lease is entirely workable without a covenant of the kind contemplated being implied. It is true that it may seem unreasonable or unfair for the First Respondent to not be obliged to contribute at all, but that is the bargain that was struck between the parties upon the relevant leases being entered into, or in this case, being assigned to the Applicant with the obligations under it passing accordingly to her.

25. Where difficulties such as those in this case manifest themselves following entry into of any given lease, then it may be that the leaseholder affected has a basis of complaint against the conveyancer undertaking the conveyancing exercise for having not brought the prospect of such issues to their attention, but that is no reason to seek to remedy any unfairness by imposing a term which is entirely unnecessary to ensure workable agreements leases operate as between the parties.

26. Although not argued before us, it is worth noting that there are further difficulties with any implied term, such as whether it would be reasonable and equitable to imply a term which essentially altered the financial bargain between the parties, or rather the fundamental premise upon which such the relationship proceeded, it is likely that there would be serious objections on this ground as the Tribunal would essential; be re-writing the bargain to make it fairer to one party over the other and thus the Tribunal would be assuming an improper role.

27. All of the above consideration are, of course, directed at the issue of an implied term. They are quite distinct from the Tribunal exercising any discretion it might be given under statute to determine the reasonableness of the service charges imposed. And thus, it remains open to the Tribunal to conclude that it is unreasonable to require the percentage set out in the lease (or any other percentage).

28. In this case, the percentage of service charge payable by the Applicant has decreased, because of the way in which the Second Respondent now calculates its service charges, as permitted by the Lease. It would seem the overall sums are now likely to be less than initially envisaged by the Lease, but the levels of service charge or the specific make-up of them are not in issue in this application.

29. Ultimately, given the very real potential for any adjustment by the Tribunal to the percentage charge to result in a deficit, which could potentially only be plugged by a call for further capital by reference to its shareholding, the Tribunal concludes that it would be inappropriate to make any

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[3] *Young and Marten -v- McManus Childs [1969] 1 AC 454*
[4] *R -v- Paddington and St Marylebone Rent Tribunal, Ex p. Bedrock Investments [1957] KB 984*
[5] *Shell UK -v- Lostock Garage [1976] 1 WLR 1187*
[6] *Lynch -v- Thorne p1965] 1 WLR 303*

adjustment to the percentage basis presently applicable to the Applicant under the Lease, as now operated by the Second Respondent (this being less than the 6.84% set out in the Particulars to the Lease – there was no suggestion that the Tribunal should adjust that by reason of anything other than the omission of any contribution from the First Respondent).

30. For the above reasons, the Tribunal determines that the absence of contribution from the First Respondent to any service charges does not render the service charge not payable or unreasonable. For the avoidance of any doubt, nothing in this decision affects any matters pertaining to the payability of service charge by reference to any other matter, such as the amount of specific charges or the standard of works carried out.

Costs

31. The Applicant made an application seeking to restrict the recovery of any costs of these proceedings via the service charge under s.20C of the 1985 Act. The only costs that are likely to be considered "relevant costs" for the purposes of service charge, and thus within the Tribunal's powers under to curtail s.20C of the 1985 Act, are those incurred by the Second Respondent. There is no ability within the Lease for the First Respondent to pass on its costs under the service charge provisions. To the extent that the First Respondent considers that position to be incorrect and it seems to levy such costs in some way through the service charge, the Applicant has liberty to re-apply to the Tribunal to progress the s.20C application in relation to those costs.

32. However, as regards the costs incurred by the Second Respondent, those costs ought be treated as expenses recoverable via service charge against the general body of leaseholders in accordance with the usual proportions. There shall be no recovery of the Second Respondents costs in whole against the Second Respondent and such costs are to be defrayed against all leaseholders generally. A s.20C order is made to that limited extent.

33. As to the fee for commencing and continuing these proceedings, the Applicant has paid the sum of £300 (£100 issue fee and £200 hearing fee). The Tribunal has a general discretion by Rule 13(2) of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013, to require a party to reimburse the other party which has not been remitted to the by the Lord Chancellor.

34. The First Respondent has succeeded in resisting these proceedings. Ordinarily, therefore, the Tribunal would not make an award that the successful party should reimburse the Applicant's issue and hearing fees, however, in this case, it will make that order, because:

    34.1. the Applicant's position in these proceedings has clarified the lawfulness of a highly unusual practice of the First Respondent landlord, albeit a lawful one, in not being obliged by to contribute towards the service charge in respect of apartments that it owns not only for her own benefit but for that of all other leaseholder on the development with the same, or materially same form of lease as the Applicant;

    34.2. there was no evidence of any substantive attempt by the First Respondent landlord to address this matter with sufficient engagement with the Applicant, or indeed, any of the other leaseholder, prior to the commencement of these proceedings which the Tribunal considers would have been a reasonable course to adopt with the view to avoiding the need for these proceedings.

PROVISIONS RELATING TO APPEALS

35. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application, whether by email to rapmidland@justice.gov.uk or to in correspondence to the regional office of the First-tier Tribunal which has been dealing with the case.

36. 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.

37. 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.

38. 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

Tribunal Judge C Kelly