



**First-tier Tribunal
Property Chamber
(Residential Property)**

Case reference	:	CHI/00ML/LSC/2022/0087
Property	:	Wick Hall, Furze Hill. Hove BN3 1NJ
Applicant	:	Adrian Money
Respondent	:	Baron Estate Management Ltd. (incorrectly stated to be Baron Homes in the Application)
Represented by	:	Dean Wilson LLP (solicitors)
Date of Application	:	15th July 2022
Type of Application	:	to determine reasonableness and payability of service charges
The Tribunal	:	Judge Bruce Edgington (chair) Judge Michael Tildesley OBE David Ashby DipSur FRICS
Date of decision	:	24th January 2023

DECISION

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1. The Tribunal's decision in respect of the matter in dispute is that the 'current market rent' for flat 86 was £1,350.00 per month on the relevant dates in 2021 and 2022. Any overpayment by long leaseholders must be refunded or credited back. No order is made in respect of 2023 or 2024 because the date for assessment of any valuation is in the future.
2. As far as costs are concerned, the Applicant has asked for orders that no costs incurred by the Respondent in these proceedings shall be the subject of any service charge or administration charge. The Tribunal makes orders under (a) Section 20C of the 1985 Act i.e. that any costs incurred by the Respondent in these proceedings are to be excluded from any service charge demanded from him, Penelope Overton and Christian Ricards and (b) under Paragraph 5A of Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") preventing the Respondent from recovering costs of this litigation from those individuals.

Reasons

Introduction

3. This is an application by Adrian Money who describes himself as the treasurer of Wick Hall Residents' Association. He has named Penelope Overton and

Christian Ricards as the secretary and chair respectively of the same organisation.

4. It seems to be agreed by the parties that the subject property consists of 167 flats, 166 of which are let on long leases. Some of these were granted by the freeholder but in 2021 the freeholder seems to have granted an intermediate long lease of the building to the Respondent subject, of course, to the existing long leases of flats. For the purpose of this application, the terms of all the long leases are the same.
5. The Applicant agrees that the relevant term in the leases where he is challenging the Respondent's interpretation is in the seventh schedule. This is the schedule which sets out the expenses to be included in the service charges to be paid by the 166 flats let on long leases. The paragraph includes:

“the cost of providing any housekeeper, porters, refuse collectors or other staff in connection with the maintenance and management of the block of flats and uniforms for such persons and other requisites as the landlord may in the interest of good management deem to be necessary including the payment of rates assessed on the flat and the current market rent of the flat in which the relevant housekeeper or porter resides and his telephone expenses provided such expenses are in fact dispersed by the landlord”

6. It is accepted by both parties that flat 86 is occupied by the building's caretaker and that such person would come within the definition of a housekeeper or porter. The essence of the dispute refers to the words “the current market rent of the flat”. When it acquired its interest in the property in November 2021, the Respondent increased the current market rent collected as part of the service charges substantially from £1,100.00 per calendar month to £1,750.00 per calendar month in respect of flat 86.
7. The Applicant argues (a) that this value is too high and (b) that the long leaseholders pay for the heating and hot water for the whole block of flats – including flat 86 – and this cost should be deducted from the current market rent because, by implication, it is argued, the landlord is seeking to make an unreasonable profit out of this situation.
8. A directions order was made by the Tribunal on the 25th October 2022 timetabling the case to a paper determination and a bundle of documents was duly lodged. Both parties have provided statements of case and supporting documents. Any reference to page numbers in this decision are references to the page numbers in that bundle. The order also said that there would be no physical inspection of the property. The parties were invited to make representations if they either wanted an oral hearing or a physical inspection of the property but neither has.

The evidence

9. In the said bundle, the Applicant refers to rents being paid or sought in the property for other flats and points out that the flat in questions is smaller than other flats, has no balcony and is on the ground floor. On page 28, the Applicant sets out rents being obtained for flats in the property with the source

of the information. As to the smaller Flat As on the ground floor, only 2 are set out with rents of £1,275 and £1,550 per calendar month. As to deductions, the Applicant refers to all service charges of £341 per calendar month (page 29) whereas the heating and hot water alone are on page 34 and said to be £871 for 6 months i.e. £145.17 per month.

10. The Respondent simply says that “the current market rent” is simply that i.e. what a landlord could obtain as a rent on the open market and a ‘valuation’ is produced from Ryan Alderson who describes himself as a senior negotiator with Stanford Estates agents. The valuation is not an expert’s report in the accepted sense of the description as there are no details of the instructions received, no details of Mr. Alderson’s qualifications or experience and no confirmation of his obligations to the Tribunal.
11. Mr. Alderson’s view is that in the summer of 2022, the market value was in the range of £1,600 - £1,700 per calendar month (page 170 of the bundle). He lists a number of properties upon which he bases that view but only one is said to be in the subject property and he gives no details as to the size of that flat. Unlike flat 86, it has a balcony, sea views and 2 en suite double bedrooms. Most of the rents quoted for 2 bed-roomed flats are about £1,500 per month or less.
12. Under a heading “Your valuation powered by Hometrack” in the report is an estimated rental value of £1,550.00 per calendar month (page 168). Also the graph at page 164 indicates the average rents of 2 bedroom properties within ¼ mile of properties in BN3 1NG to be about £1,300 per month for November 2021 and October 2022. The discrepancies are not explained and neither is the reason why the comparison is made with that postal code when the code for the subject property is BN3 1NJ.
13. The Respondent has also produced a document setting out the percentages of service charges paid by the flats which confirms that the flats on long leases, i.e. all except flat 86, pay 100% of the cost of hot water and heating for the building including that for flat 86.

The Lease

14. Flat 86 has no separate long lease. There are 3 examples of long leases of other flats in the property in the bundle and the relevant clause referred to above is contained on pages 90, 124 and 151 in the bundle.
15. As far as legal costs are concerned, the long leases contain generous provisions enabling the landlord to collect legal costs from the long leaseholders in almost all circumstances. For example, on pages 91 and 92 paragraph 17 of the seventh schedule enables the landlord to collect “*All legal and other professional costs incurred by the Lessor in connection with any dispute action or proceedings relating to the building of which the flat forms part...*”.

The Law

16. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord’s costs of management which varies ‘according to the relevant costs’. Under section 27A, this Tribunal has the jurisdiction to determine whether service charges are reasonable or payable.

17. Section 20C of the 1985 Act gives the Tribunal the power to order that any costs incurred by a landlord in a case before the Tribunal can be excluded from any service charge. Paragraph 5A of Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** (“the 2002 Act”) allows a Tribunal to make orders preventing a landlord from recovering costs of litigation from a tenant.
18. The Respondent argues that the lease is clear and says that ‘current market rent’ is payable by the long lessees. On the other hand, the Applicant says that there must be implied into the terms of the lease a requirement that credit is given to the long lessees because they already pay the hot water and heating costs of flat 86.
19. In order to assist the Tribunal, it has considered general rules of interpretation if there is an ambiguity. In order to assist courts (and Tribunals) in these difficult matters, the *contra proferentem* rule was devised many years ago. It is not, of course, the only rule of interpretation but it is, perhaps, the most relevant to this problem. It translates from the Latin literally to mean “against (*contra*) the one bringing forth (the *proferens*)”.
20. The principle derives from the courts’ inherent dislike of what may be described as ‘take it or leave it’ contracts such as residential leases which are the product of bargaining between parties in unfair or uneven positions. To mitigate this perceived unfairness, this doctrine was devised to give the benefit of any doubt to the party upon whom the contract was ‘foisted’.
21. In the case of **Granada Theatres Ltd v. Freehold Investments (Leytonstone) Ltd** [1958] 1 WLR 845, Mr. Justice Vaisey said, at page 851, that “*a lease is normally liable to be construed contra proferentem, that is to say, against the lessor by whom it was granted*”.
22. Thus, if there is ambiguity, *contra proferentem* would appear to dictate that a ruling is made in favour of the lessees. In this case, the whole point of the disputed provision is to make sure that the landlord is not liable to meet any expense incurred in the employment of a caretaker. The landlord already receives the cost of heating and hot water used in flat 86 from the long lessees. The question therefore is whether it was the intention of the parties when the long leases were entered into that the landlord should receive both the open market rent for an assured shorthold tenancy and the cost of heating and hot water?

Conclusions

23. Taking into account the evidence of both parties and doing the best it can using its own knowledge and experience, the Tribunal’s conclusions are:
 - (i) That the report from Mr. Alderson is not an expert’s report in the legal sense and contains unexplained inconsistencies.
 - (ii) Many of the examples of rents advertised in the report are for £1,500 per month or less for 2 bedroom properties.
 - (iii) It seems to be accepted that flat 86 is relatively small without a balcony or sea view and the current market rent for the dates considered will be less than most of the rents referred to.

- (iv) Although the Applicant agrees a rent of £1,500 per month (at page 46), this is only on the basis that there is a reduction to cover hot water and heating costs. The Applicant's own evidence is that the 2 rents being obtained or advertised are £1,225 and £1,550 per month and the Tribunal infers that these would be let on assured shorthold tenancies on a fully furnished basis.
- (v) The overall evidence of both parties leads the Tribunal to determine that the current market rent for flat 86 in 2021 and 2022 was £1,350 per calendar month. Despite the request by the Applicant to fix a method of calculation for future years, this cannot be done as there is no means of anticipating what a market rent will be. The percentage increase suggested by the Applicant could be used as a starting point if the parties agree.
- (vi) As to any deduction for heating and hot water, the Tribunal concludes that the long leases are not ambiguous which means that the current market rent must be part of the service charges without the deductions sought.

Costs

- 24. The Tribunal has been asked to make orders to ensure that the Applicant and the officers of the residents association do not have to pay for the landlord's costs of representation in this case. Despite being ordered to include any representations on this issue in their statements of case (page 20 of the bundle), the Respondent has not commented on this.
- 25. The Tribunal's jurisdiction is not what is sometimes referred to as 'costs shifting' which is contrary to the situation in the civil courts. In other words, the 'winning' party can expect a costs order in the courts but not before a Tribunal. In this case the Respondent will presumably rely upon the terms of the lease which provide for costs to be recovered in this sort of case subject to any over-riding decision of this Tribunal.
- 26. The Tribunal concludes that the substantial and unreasonable increase in the current market rent in November 2021 was unsustainable. The Respondent relies upon 'evidence' produced after the event. There does not appear to be any evidence which justifies a rent of £1,750 per calendar month in November 2021 for a relatively small unfurnished flat with no balcony or sea view. Judging from the report produced by the Respondent, even it appears to accept that the increase demanded was excessive.
- 27. Therefore, and whilst the Applicant has not succeed on one of the issues i.e. any deduction for hot water and heating costs, the Tribunal determines that the Respondent has behaved unreasonably and costs orders are made as requested.



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Judge Bruce Edgington
27th January 2023

ANNEX - RIGHTS OF APPEAL

- i. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.
- ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
- iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
- iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.