

The following cases are referred to in this decision:

Capital & Counties Freehold Equity Trust Ltd v BL plc [1987] 2 EGLR 49

Embassy Court Residents' Association v Lipman (1984) 271 EG 545

Gilje v Charlegrove Securities Ltd [2002] 1 EGLR 41

The following further cases were cited in argument:

St Mary's Mansions Ltd v Limegate Investment Co Ltd [2003] 1 EGLR 41

Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896

Liverpool City Council v Irwin [1977] AC 239

Lloyds Bank plc v Bowker Orford [1992] 2 EGLR 44

DECISION

1. The respondent in this case is the leaseholder of a flat, number 66, which is part of a building known as 31-68 Mead Court on the appellant's Mead Court Estate in Kingsbury, NW9. She holds the flat under a lease for 125 years from 23 August 1982, which was granted by the appellant on 20 October 1986 under the Right to Buy legislation in the Housing Act 1980. She applied on 7 April 2004 to the Leasehold Valuation Tribunal for the London Rent Assessment Panel under section 27A of the Landlord and Tenant Act 1985, seeking a determination of liability to pay service charges for the years ending 31 March 2001, 2002, 2003 and 2004.

2. Under clause 4(A)(i) and (ii) of the lease the respondent is liable to pay a reasonable part of "the expenditure incurred by the Council" during the council's financial year "in fulfilling the obligations and functions set out in Clause 6 hereto." Clause 6 contains the landlord's covenants. They consist of:

- 1) Peaceful enjoyment;
- 2) Repair of the building of which the flat forms part;
- 3) Repair of other property over which the lessee has rights under the lease;
- 4) Painting the outside and common parts of the building;
- 5) Provision of services;
- 6) Insurance;
- 7) Procuring observance of the other lessees' covenants if so required by the lessee.

3. Under clause 6 the council covenanted as follows:

"(5) To provide such of the following services to or for the benefit of the flat as are enjoyed by the Lessee and provided by the Council at the date hereof (save that nothing herein shall prejudice the right of the Council in its absolute discretion during the term hereby granted to provide to or for the benefit of the Flat any service not presently enjoyed by the Lessee) and to ensure so far as practicable that they are maintained at a reasonable level and to keep in repair any installation connected with the provision of those services namely:-

(a) In the building

- i. Hot water supply
- ii. Central heating
- iii. Window cleaning
- iv. Lift(s)
- v. Lighting cleaning carpeting and maintenance of common parts
- vi. Collection and/or disposal of refuse

- vii. Entry-phone system
- viii. Common television aerial and/or landline
- ix. Laundry and drying-room facilities
- x. Pumped domestic water supply
- xi. Mechanical ventilation

(b) On the Estate (or if the Building is not part of an estate then in relation to its grounds and apparent areas)

- i. Lighting cleaning maintenance and removal of (estate) roads paths car parks forecourts or other common parts
- ii. Lighting cleaning and maintenance of gardens or recreation areas
- iii. Maintenance and renewal of boundary fences and walls
- iv. Provision of caretakers or other necessary employees or agents
- v. Clubroom facilities

(6) To insure the Flat to the full insurable value thereof against destruction or damage by fire tempest flood and other risks against which it is normal practice to insure and in the event of destruction or damage by any such risk as aforesaid to rebuild or reinstate the Flat and the Building.”

4. Included in the service charges sought from the respondent in each year was an item described as “management fee” in the amounts of £59.96, £63.40, £75.95 and £72.36 for each of the four years in dispute. The LVT disallowed these amounts. In paragraph 12 of its decision it said:

“Further, although the Tribunal has felt considerable concern about the quality of management operations in relation to Mead Court, so that it would have considered whether a reduction in charges would have been appropriate, it has reached its decision to disallow Management Fees altogether for a different reason which was raised at the Hearing. This reason is that the Lease contains no provision entitling the Lessor to charge the Lessee, as it has sought to, a management fee of 15% of other expenditure. It might be arguable that the Lessor’s obligation under the Lease (Clause 6) as to repairs, decorations and services necessarily require expenditure on management which would come within the service charge payable (Clause 4(A)). However, the Tribunal saw no evidence justifying or quantifying any actual expenditure incurred by the Lessor and the charge itself did not purport to be anything other than a unilaterally imposed percentage fee. As a matter of established principle, the Lessor cannot recover money from the Lessee in the absence of clear contractual provisions entitling it to do so (see *Gilje v Charlegrave Securities Ltd* [2001] EWCA Civ 1777 and also *Embassy Court v Lipman* (1984) 271 EG 545). This means that the Tribunal has determined to deduct from the four service charge totals the following sums: £359.96, £63.40, £75.95 and £72.26 respectively.”

5. The appellant now appeals with permission of this Tribunal. Although the actual amounts in issue are small, the matter is of much wider significance to the appellant because of the large number of other flats that are held under leases containing similar terms. The appellant contends that the LVT was wrong, on a proper construction of the lease, to conclude that it had no power to include in the service charge an amount in respect of management fees.

6. The appellant is a housing authority, and while some of the flats in Mead Court have been sold under the RTB legislation others are subject to secure tenancies. The appellant's housing stock is managed by Brent Housing Partnership. The management fee which the appellant seeks to charge has been calculated on the basis of 15% of certain of the service charge items. Expressed as a percentage of the total service charge demands it has represented between 11.19% and 13.40% in the four years in dispute. It appears that most, if not all, of the RTB leases that were granted by the council before the LVT decision were in similar terms. Since the LVT decision provision for the inclusion of management fees has been inserted in all new leases granted by the council.

7. For the appellant Mr Stan Gallagher submitted that it was self-evident that a management input was required to facilitate the discharge of the various landlord's covenants. The ground rent reserved in the lease was £10, and there was no question of this being sufficient to cover the cost of management. Unless, therefore, the RTB lessees were to be subsidised out of the council's general housing revenue account funds it was necessary to imply a term that the lessees pay a fair proportion of the costs of management. Construing the lease as a whole, such an implied term was appropriate, said Mr Gallagher, in view of the provision of clause 7(4) which related to the resolution of disputes and specifically referred to the costs of management. Clause 7(4) is in these terms:

“If any dispute or difference shall arise between the Council and the Lessee concerning the determination in a particular manner or on particular evidence of any question whether any amount payable before costs for services repair maintenance insurance or management are incurred is reasonable whether such costs were reasonably incurred or whether services or works for which costs are incurred are of a reasonable standard them and in every such case the dispute or difference shall be referred in accordance with the provisions of the Arbitration Act 1950 or any statutory modification or re-enactment thereof for the time being in force to the determination of a single arbitrator to be agreed upon by the Council and the Lessee or failing agreement to a person nominated by the President for the time being of the Royal Institution of Chartered Surveyors.”

8. Alternatively, Mr Gallagher said, management costs consisting in the council's direct costs of organising works and the provision of services were all part and parcel of the discharge of the landlord's covenants under the lease, and thus fell within the scope of clause 4(A)(i) and (ii) without the need to imply a term.

9. For the respondent Mr Andrew Allen submitted that a lessor was not entitled to recover money from a lessee in the absence of clear contractual provisions entitling it to do so. The lease in the present case made no express references to a management fee and the only reference to management was in clause 7(4), which was clearly an imported clause that could

not be treated as creating an obligation. To imply such a term, said Mr Allen, was in any event contrary to the Application of Unfair Terms in Consumer Contracts Regulations 1999 and would not be binding on the lessee.

10. The obligation of the lessee under clause 4(A)(i) and (ii) is to pay “a reasonable part” of the “expenditure incurred by the Council” in “fulfilling the obligations and functions set out in Clause 6”. I distinguish, with quotation marks, the three elements of the provisions that require consideration in relation to the application under section 27A. Nothing arises in for present purposes on the first of these, the reasonable part. The second, expenditure incurred by the council, is not, I think, a matter of disagreement between the parties in terms of its meaning. Expenditure means what it says, spending, or financial outgoings. “Incurred” may include the incurring of liability to make a payment as well as the making of a payment: see *Capital & Counties Freehold Equity Trust Ltd v BL plc* [1987] 2 EGLR 49.

11. It is the third element of the obligations in clause 4(A)(i) and (ii) that is crucial for present purposes. To be recoverable the expenditure must be incurred by the council in fulfilling the obligations and functions set out in clause 6. There is, in my judgment, no ambiguity in this. To the extent that expenditure is so incurred it is recoverable, and whether it is so incurred is a question of fact. Clause 6 includes usual landlord’s covenants, of which the provision of services is one, and with the exception of the covenant for quiet enjoyment they will require expenditure to be incurred by the council in their performance. If repairs are to be carried out or windows painted or staircases cleaned someone will have to be paid for doing the work and someone will have to arrange for the work to be done, supervise it, check that it has been done and arrange for payment to be made. Since the council can only act in these respects through employees or agents it will have to incur expenditure on all these tasks. If it does incur such expenditure, the lessee will be liable to pay a reasonable part of it.

12. That this is the effect of clause 4(A)(i) and (ii) is reinforced by the provisions of clause 7(4), which expressly refers to the costs of management. It is also reinforced by a consideration of the context in which the clauses in the lease were drafted. The lease in this case was made under RTB provisions in the 1980 Act, the lessor is referred to as the council, and clause 6 is effectively providing for the continued performance by the council of functions that until the grant of this lease it had performed under the respondent’s secure tenancy. It seems improbable that a housing authority forced in 1986 to sell part of its housing stock at a substantial discount and at a nominal ground rent would have chosen to subsidise the purchasing tenant by including in the lease a provision that made her liable for part only of the council’s costs in performing its covenants under the lease.

13. No question of implying a term in the lease arises, in my view. The provisions are clear. Under clause 4(A)(i) and (ii) it is the total expenditure incurred in fulfilling the clause 6 obligations that is recoverable. That certain of the work done in fulfilment of those obligations – for example, arranging for work to be done or approving payment for it – may be classified as management does not take it outside the scope of clause 4(A)(i) and (ii). It is a question of fact what management tasks were performed in the financial year in question in fulfilling the council’s obligations under clause 6. It is also a question of fact what expenditure was incurred on them and (for the purpose of applying the statutory provisions) whether such expenditure was reasonable. The cost of employing agents to carry out any of the functions

under clause 6, both for managerial and other tasks, would be covered by clause 4(A)(i) and (ii) provided that it was reasonable.

14. Mr Allen referred to passages in Hill and Redman's Law of Landlord and Tenant at para [4627] that a landlord will not normally be able to recover the cost of employing managing agents in the absence of express provision to that effect and in Woodfall's Law of Landlord and Tenant at para 7.170 that "as a general rule the cost of employing managing agents will not be recoverable unless the lease expressly so provides". The authority for each of these statements was shown as *Embassy Court Residents' Association v Lipman* (1984) 271 EG 545. Mr Allen also relied on *Gilje v Charlegrove Securities Ltd* [2002] 1 EGLR 41, in which at para 31 Mummery LJ had noted, with implied approval, the statement in the Encyclopaedia of Forms and Precedents (5th edn, vol 23 p 71 para 55) that "the courts tend to construe service charge provisions restrictively and are unlikely to allow recovery for items which are not clearly included." The two authorities cited were the ones referred to in the LVT decision.

15. In *Embassy Court Residents Association* the landlord was a company limited by guarantee formed by the tenants of the 14 flats in Embassy Court. The issue was whether, under the terms of a tenant's lease, it could recover the cost of employing a management company to carry out its obligations under the lease. The Court of Appeal upheld the county court's decision that it could do so. The terms of the lease and the court's reasoning do not require consideration for present purposes. Reliance is placed, however, on certain dicta of Cumming-Bruce LJ. At 632 he said:

"No doubt in the case of leases entered into between a landlord and tenant it is necessary for the landlord to spell out specifically in the terms of the lease, and in some detail, a sufficient description of every financial obligation imposed upon the tenant in addition to the tenant's obligation for rent..."

And at 64F he said:

"... If I am right in holding that the judge was correct in his views, as a matter of construction, that it was open to the Resident's Association Ltd to incur administrative expenditure and to recover it, is there any difficulty arising from the fact that, when the work reached the peak that it did in 1980 or 1981, the Association should decide to employ managing agents? Again, it is perfectly clear that if an individual landlord wants to do that and to recover the costs from the lessee, he must include explicit provisions in his lease..."

16. In *Gilje* the issue was whether under the terms of a lease the landlord could recover the notional cost of providing accommodation for a caretaker, and the Court of Appeal held that it could not do so. In the course of his judgment at para 27 Laws LJ said this:

"...The landlord seeks to recover money from the tenant. On ordinary principles there must be clear terms in the contractual provisions said to entitle him to do so. The lease, moreover was drafted, or proffered, by the landlord. It falls to be construed contra proferentem..."

17. It does not seem to me that these statements of principle, which I accept as being correct, are of assistance to the respondent in the present case. The provisions of the lease are, in my judgment, clear. It is the tenant who is contending that under clause 4(A)(i) and (ii), which refers to “the total expenditure incurred by the Council” in fulfilling the clause 6 obligations, the council is not entitled to be reimbursed for its total expenditure in fulfilling the objections but only for the part of such expenditure that consists in payments made for carrying out the physical tasks of repair, cleaning and so forth. There is no justification, in my view, for limiting the clear terms of the provisions in this way.

18. Mr Allen’s further argument was that, if the lease did impose on the lessee a liability for management costs, this would be an unfair term under the Application of Unfair Terms in Consumer Contracts Regulations 1999 and therefore would not be binding on the tenant. Regulation 5 provides as follows:

“5(1) A contract term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.

5(2) A term shall always be regarded as not having been individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term.”

Under regulation 8 an unfair term is not binding on the consumer.

19. Assuming, as I do, that the Regulations have application to a lease such as this, I cannot see that they are of any assistance to the respondent. Mr Allen was unable to explain in terms that I could understand why a term that made the lessee liable for the total cost of providing services to her rather than for part only of those costs would be contrary to good faith or would cause a significant imbalance in the parties’ right and obligations. I see no reason at all for thinking that the provisions of the lease, construed in the way that I have construed them, fall foul of the Regulations.

20. The appeal must accordingly be allowed. The question remains of what amounts should be allowed as reasonable in relation to the costs of management in fulfilling the obligation to provide services. Although in its decision the LVT said that it “saw no evidence identifying or quantifying any actual expenditure incurred by the lessor and the charge itself did not purport to be anything other than a unilaterally imposed percentage fee”, in view of the basis of its rejection of the lessor’s case, that the lease did not provide for management charges, it appears at least possible that it did not consider the question of reasonableness as fully as it would have done if it had concluded that such charges were provided for. It expressly said that it did not consider whether a reduction in charges would have been appropriate because of the quality of management operations.

21. In these circumstances it is right, in my view, that the question of reasonableness should be looked at again. Although evidence on this had been prepared for the Lands Tribunal hearing, it seems to me clear that the appropriate forum for considering this is the LVT, which

has already received relevant evidence and has inspected the property. Both counsel urged on me the appropriateness of remitting the case to the LVT for this purpose. The legislation contains no express provision enabling the Lands Tribunal to remit a case to the LVT for further consideration. Section 175(4) of the Commonhold and Leasehold Reform Act 2002 provides simply that on an appeal the Lands Tribunal may exercise any power which was available to the LVT. It seems to me that one of the powers available to the LVT, if it had taken a different view on the scope of clause 4(A)(i) and (ii), would have been to direct that the hearing should be re-opened for the purpose of considering further the question of reasonableness. Remission can thus be achieved by this Tribunal directing that the hearing be re-opened for this purpose, and I so direct.

Dated 23 October 2006

George Bartlett QC, President