UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2011] UKUT 326 (LC)
Case Number: LRX/36/2010

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – legal fees – whether to be treated as part of landlord's costs for purposes of service charge under terms of the lease – held they were not – appeal allowed

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

BETWEEN **RICHARD JONATHAN GREENING** **Appellant**

and

CASTELNAU MANSIONS LIMITED **Respondent**

Re: Flat 10,
Castelnau Mansions,
Castelnau,
London, SW13 9QX

Before: The President

Sitting at 43-45 Bedford Square, London, WC1B 3AS
on 15 August 2011

The appellant in person
Mr Jitendra Kumar, a director of the respondent company, for the respondent

The following cases are referred to in this decision:

Sella House Ltd v Mears [1989] 1 EGLR 65
Iperion Investment Corporation v Broadwalk House Residents Ltd [1995] 2 EGLR 47

DECISION

1. This is an appeal against a decision of a leasehold valuation tribunal for the London Rent Assessment Committee on a claim referred to it by Wandsworth County Court. The claim, against the appellant, Mr Greening, was for £11,258.02 in respect of unpaid service charges on his flat, 10 Castelnau Mansions, London SW13 9QX, plus interest. The flat is one of 50 flats in two blocks, of which the respondent, Castelnau Mansions Limited, is the owner of the freehold, having acquired it on a collective enfranchisement in 2003 or 2004.

2. The LVT determined that the sum of £11,258.02 was payable by Mr Greening. It rejected all the contentions that he advanced. On 28 June 2010 I refused him permission to appeal, but on 15 September 2010 I reviewed my decision and gave him permission on one ground. That ground relates to the question whether the company is entitled to include legal fees incurred by it as part of its costs for the purposes of the service charge. An amount of £4,663 for legal fees is included as an item in the service charge accounts for the year ended 31 December 2008. Mr Greening's contention is that, under the terms of his lease, he is not liable to contribute to this amount and that there is Court of Appeal authority to support the construction of the lease that he advances.

3. The notes to the accounts say:

> "Legal fees of £4,663 relate to the collection of outstanding service charges due from a single tenant at Castelnau Mansions. Legal proceedings have been issued against this tenant and a hearing is scheduled in 2009 at the Land Valuation Tribunal. A claim for expenses has been lodged with the County Court for reimbursement of these legal fees."

4. The tenant referred to is Mr Greening. The effect of his succeeding in this appeal would be that the amount in question could not be charged to the service charge account. Except to the extent that it might constitute costs of the county court claim and might become the subject of an award of costs against Mr Greening (the costs of such proceedings having been reserved to the county court under the transfer order), the amount would have to be absorbed by the company. It could seek this amount from its shareholders, who comprise almost all the tenants of Castelnau Mansions. Mr Greening has only recently become a shareholder.

5. Mr Greening holds under a lease for 99 years from 29 September 1971. Under clause 4(4) the lessee covenants to pay to what is referred to as "the Third Company" (now, the parties assume, Castelnau Mansions Limited) "the Interim Service Charge and the Service Charge at the time and in the manner provided in the Fifth Schedule". The Service Charge is defined in the Fifth Schedule as the percentage specified as the tenant's share of Total Expenditure in the particulars (1.81608%); and Total Expenditure is defined as the total expenditure incurred by the Third Company in any Accounting Period in carrying out its obligations under clause 5(5) of the lease. The Interim Service Charge is the amount payable on account in respect of each accounting period. The clause 5(5) obligations that are relevant for present purposes are these:

"(j) (i) To employ at the Third Company's discretion a firm of Managing Agents to manage the Building and discharge all proper fees salaries charges and expenses payable to such agents or such other person who may be managing the Building including the cost of computing and collecting the rents in respect of the Building or any parts thereof.

(ii) To employ all such surveyors builders architects engineers tradesmen accountants or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the Building."

6. Before the LVT the issue of legal fees was recorded as arising in this way:

"22. Finally we considered an application by Mr Greening under s 20C of the Landlord and Tenant Act 1985 for an Order that the costs were not recoverable in these proceedings by way of a service charge. Mr Greening's argument was that the lease did not make provision. The Applicants say the Lease does and cited clause 5J (ii)…"

Although raised in this way in terms of an application under section 20C (which enables an LVT to order that all or any of the costs incurred before, inter alia, a court or an LVT, should not be regarded as relevant costs for the purposes of the service charge) Mr Greening's case evidently related to the wider question whether legal fees could be included as part of the total expenditure for the purposes of the service charge.

7. The LVT dealt with the matter as follows::

"28. We turn then to the question of the costs of the proceedings before us and the application of section 20C of the 1985 Act. It is the Tribunals view that the terms of the lease are just sufficient to enable the applicant to recover the costs of these proceedings through the service charge regime. The phraseology to include the administration of the building in our finding does enable them to recover the costs of solicitors in advising. However we made clear that any costs that are sought to be recovered through the service charge regime are capable of being challenged by Mr Greening and indeed any other lessee under the provisions of s27A of the Landlord and Tenant Act 1985.

29. So far as the legal costs in connection with the County Court proceedings are concerned those will need to be dealt with before the County Court as will the interest."

8. Mr Greening's contention is that this is wrong. He relies on the Court of Appeal decision in *Sella House Ltd v Mears* [1989] 1 EGLR 65, which concerned tenant's covenants identical to those in clause 5(5)(j)(i) and (ii) except that (j)(i) included the words "and Chartered Accountants" after "Managing Agents". It appears that the LVT was not referred to this decision. Giving the principal judgment, Dillon LJ said (at 67M-68E):

"The argument for the plaintiff is that solicitors' costs and counsel's fees for recovering arrears of rent and service charges from tenants, if the solicitors are instructed directly by the plaintiff, falls under the words 'administration of the Building', in clause 5(4)(j)(ii), that is to say:

> ‘To employ … professional persons as may be necessary or desirable for the proper … administration of the Building.’

If, conversely, the solicitors are instructed by the managing agents, they fall within the phrase:

> ‘including the cost of…collecting the rents and service charges …’

They are, as is said, part of the managing agents’ charges and expenses for collecting the rents and service charges.

The learned judge dealt with this by saying, in relation to (j)(i), that relates to the management of the building. He then said that the words in (j)(i) including the cost of computing and collecting the rents and service charges are clearly referable back to the words Managing Agents and Chartered Accountants and do not contemplate the fees of solicitors and counsel. In relation to (j)(ii), the judge said that the words ‘ or other professional persons’ must be related to the proper administration of the building. The words did not appear to the judge to cover legal proceedings for possession or arrears of rent…

[Counsel for the appellant] has drawn our attention to various other provisions in the lease which relate to legal fees where proceedings are contemplated. For instance, in clause 5(3) it is provided that the lessor:

> “At the request of the Tenant and subject to payment by the Tenant of (and provision beforehand of security for) the costs of the lessors on a complete indemnity basis to enforce any covenants entered into with the lessors by a tenant of any flat in the Building of a similar nature to those contained in Clause 4 of this lease.”

The covenants in clause 4 include the covenant by the tenant to pay the interim charge and the service charge.

There is also a provision by way of covenant by the tenant in clause 3(9) of the lease:

> ‘To pay to the lessors all costs charges and expenses including Solicitors’ Counsel’s and Surveyors’ costs and fees at any time during the said term incurred by the lessors in or in contemplation of any proceedings in respect of this lease under Sections 146 and 147 of the Law of Property Act 1925… of and incidental to the preparation and service of a notice under the said Sections and of and incidental to the inspection of the Demised Premises… such costs and charges and expenses as aforesaid to be payable notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court.’

I have had certain hesitation on this point, in the light of the argument in relation to the position where solicitors are instructed by the managing agents. It does not appear from the evidence whether that was actually the case. On the whole, however, I have come to the conclusion that the judge was right in his view that the fees of solicitors and counsel are outside the contemplation of either limb of clause 5(4) (j) of the lease. Therefore, I would dismiss the cross-appeal by the Plaintiff also.”

9. Agreeing Taylor LJ said (at 68E):

> "I add only a few words on the issue whether legal fees can be included in the service charge under this lease. Nowhere in clause 5(4)(j) is there any specific mention of lawyers, proceedings or legal costs. The scope of (j)(i) is concerned with management. In (j)(ii) it is with maintenance, safety and administration. On the respondent's argument a tenant, paying his rent and service charge regularly, would be liable via the service charge to subsidise the landlord's legal costs of suing his co-tenants, if they were all defaulters. For my part, I should require to see a clause in clear and unambiguous terms before being persuaded that that result was intended by the parties. Accordingly, I agree with Dillon LJ that the terms of para (j) of clause 5(4) do not extend to cover legal costs in the service charge."

10. It is to be noted that not only is clause 5(5)(j)(i) and (ii) in the lease now under consideration effectively in the same terms as clause 5(4)(j)(i) and(ii) as considered in *Sella House* but clauses 5(4) and 3(9) are in identical terms to clauses 5(3) and 3(9) as referred to in that case.

11. In *Iperion Investment Corporation v Broadwalk House Residents Ltd* [1995] 2 EGLR 47 the Court of Appeal distinguished *Sella House* in construing the terms of a different lease. It held that "Landlord's costs" as defined included its litigation costs in proceedings against the tenant. But Peter Gibson LJ said (at 48K) that the relevant provision was very different from that in Sella House. Here, however, the provisions are the same as those construed by the Court of Appeal in *Stella House* and there is no scope for a different construction. In the present case that means that the legal fees in issue cannot be brought within the terms of clause 5(5)(j)(ii), and the LVT was wrong to conclude that they could. I have little doubt that, had its attention been drawn to *Sella House*, its decision would have been different.

12. For the company, Mr Jitendra Kumar suggested that the provisions of the lease could be given a more favourable construction in the light of the collective enfranchisement that had taken place. The effect of the enfranchisement was to bring into line the interests of the lessees and those of the lessor, a company owned by the lessees. The appellant had deliberately sought to avoid his service charge obligations for the period from 1 January 2006 to 30 June 2009. As a result the respondent was placed under great financial pressure to finance expenditure necessary for the maintenance and administration of the building, and it was necessary to incur legal fees for the purposes of expediting the collection of the appellant's unpaid service charge. The respondent company, which was owned by the leaseholders, had seven directors, all of whom were volunteers on behalf of the other leaseholders. They were not experts in building management, and so they needed to seek professional advice. They had spent an enormous amount of time seeking to get Mr Greening to pay his service charges.

13. Mr Greening's appeal is without any apparent merit. It is obviously desirable, where the landlord is a company owned by the tenants, that such legal fees as these, if not chargeable to the tenant himself, should be recoverable through the service charge. I cannot accept, however, that events occurring after the date of the lease – here the collective enfranchisement – can be taken into account so as to change the meaning that is given to its provisions. The

conclusion that the terms of the lease do not cover legal fees is inescapable in the light of the decision in *Sella House*, and the appeal must be allowed. Mr Greening's liability to the service charge must therefore be reduced by 1.81608% of £4,663, ie by £84.68.

Dated: 17 August 2011

George Bartlett QC, President