FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/41UK/LIS/2019/0006**
Property	**:**	**Dosthill Hall, Two Gates, off Blackwood Road, Tamworth, Staffordshire B77 1LJ**
Applicant	**:**	**Dosthill Hall Management Company Ltd**
Representative	**:**	**Pickerings, Solicitors**
Respondent	**:**	**Mr N M Smith**
Representative	**:**	**Resolve Law Group**
Type of Application	**:**	**Application for a determination of liability to pay and reasonableness of service charges under section 27A Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Judge C Goodall** **Mr V Ward, FRICS, Deputy Regional Valuer**
Date of deliberations	**:**	**25 April 2019**
Date of Decision	**:**	**2 May 2019**

DECISION

Background

1. This is an application for a determination on a single point of interpretation of the leases for a development of 12 flats situate at the Property.

2. The Property was converted into flats by the Respondent in 2007. Nine of the flats are let on long leases containing provisions requiring the lessees to contribute towards a service charge (called a maintenance contribution or maintenance charge in the leases). Three are not let on long leases; they have been let by the Respondent, who retains the freehold, to tenants on assured shorthold tenancies (AST's"). It has not been suggested that the terms of the AST's oblige the tenants under them to pay a service charge.

3. The nine long lessees ("the Lessees") are now paying the service charge. The Applicant alleges that no service charge is being paid for the three flats let by the Respondent on AST's ("the Non-contributing Flats"), in breach of a specific clause in the leases saying he would. The papers did not disclose which flats are let to Lessees, and which are Non-contributing Flats, but at the inspection the Tribunal was informed that these are flats 5, 6, and 12. We do not think that identification of the specific flats is in fact needed in order to determine the point being raised in this application.

4. The Applicant seeks a determination from this Tribunal that the Respondent must pay the service charge applicable to the Non-contributing Flats.

5. Neither party requested a hearing, and the Tribunal met to consider this case on the papers provided by the parties on 25 April 2019. Prior to the meeting, the Tribunal inspected the Property.

Inspection

6. The Tribunal members met Mr Osborne and Mr Ormond, who both introduced themselves as directors of the Applicant, on site. They showed us round the Property, though we did not enter any individual flat.

7. The Property is a converted late eighteenth century house comprising twelve flats. There is a main door on the south side of the building leading to a substantial entrance hall and stairwell to two upper floors. Flats 1-8 are located off the hallway/stairwell, 1-3 having ground floor entrances, 4 and 5 being accessed off the first floor, and 6-8 accessed from the second floor.

8. There is an external courtyard with an annex building to the east of the main house, which the Tribunal was told was included in the lease of Flat 3. The other four flats were on the eastern northern and western edges of the courtyard. To the north east of the site there is a large car park, providing two parking spaces per flat.

The leases

9. We have been provided with a copy of the lease for Flat 3, which is let to a Lessee. We assume that the other eight leases to Lessees are in the same format.

10. The lease term is 125 years from 1 January 2007. There is a rising ground rent of £250 initially which doubles every 25 years. The "Building" is the building known as Dosthill Hall comprising 12 flats and associated common parts. The individual flat demised in the lease is defined as the "Flat"; all 12 flats are defined as the "Flats".

11. There is a recital in the lease which provides:

> "The Lessor is desirous of demising the Flats subject to the regulations contained in the Seventh Schedule hereto to the intent that the Lessees for the time being of any of the Flats may enforce the observance of the regulations inter se"

12. Clause 8 of the lease contains covenants by the Lessor (i.e. the Respondent) which include these clauses:

> "8.2 If so required by the Lessee (and upon the Lessee indemnifying the Lessor against all costs and expenses and providing such security in respect of costs and expenses as the Lessor may reasonably require) to enforce the covenants and conditions similar to those contained herein on the part of the Lessee entered into or to be entered into by the lessees of the other flats in the Building so far as they affect the Flat.
>
> ...
>
> 8.5 That every lease or tenancy of a flat in the Building hereafter granted by the lessor will contain regulations to be observed by the lessee or tenant thereof similar to those contained in the Seventh Schedule hereto or as amended from time to time under the power contained in Clause 14 hereof.
>
> 8.6 That the Lessor will for the period that any flat in the Building is unlet or unsold pay in respect of all such flats to the Management Company the maintenance contribution which would otherwise be payable in respect thereof.
>
> 8.7 That the Lessor will carry out or cause to be carried out all necessary repairs to any flats which are not for the time being let on terms similar in all material respect to those contained in this Lease. ..."

13. The service charge itself if referred to in the Fifth Schedule, which by clause 4 in the lease the Lessee has covenanted to observe. It provides:

> "1. That the Lessee will in respect of each and every year pay to the Management Company the costs incurred by the Management Company in the performance of the obligations referred to in Parts I II III and IV of the Sixth Schedule hereto such costs to be divided equally between the existing Lessees from time to time of the Building. ...[1]"

The Law

14. Sections 18 to 30 of the Landlord & Tenant Act 1985 ("the Act") contain important statutory provisions relating to recovery of service charges in residential leases.

[1] At the inspection, the Tribunal was told that the maintenance contribution is shared, presumably by common agreement between the lessees, on the basis of floor area, so not strictly equally.

Normally, payment of these charges is governed by the terms of the lease – i.e. the contract that has been entered into by the parties. The Act contains additional measures which generally give tenants additional protection in this specific landlord/tenant relationship.

15. Under Section 27A of the Act, the Tribunal has jurisdiction to decide whether a service charge is or would be payable and if it is or would be, the Tribunal may also decide:-

    a. The person by whom it is or would be payable
    b. The person to whom it is or would be payable
    c. The amount, which is or would be payable
    d. The date at or by which it is or would be payable; and
    e. The manner in which it is or would be payable

16. Section 27A is sufficiently wide in scope to bring the issue raised in this application within the jurisdiction of this Tribunal; we are essentially being asked to determine whether a service charge is payable by the Respondent in respect of the Non-contributing Flats.

17. Determination of this question requires us to interpret the lease. The leading case on interpretation of leases is *Arnold v Britton [2015] UKSC 36*. In the leading judgement of Lord Neuberger, he says at paragraph 15:

    "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101*, para 14. And it does so by focussing on the meaning of the relevant words, … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

The Respondent's position

18. In his submission, the Respondent said "I have always been willing to pay the service charge for properties which are unlet either with an assured shorthold tenancy agreement on a short term let or with a long lease." This sentence appears to be an acceptance that the Respondent will pay the maintenance contributions in respect of vacant flats that he still owns. Later in the submission he says "I consider that my obligations as to contributions to the service charge should only extend to those parts of Dosthill Hall which for the time being are unlet or unsold … and "unlet" would mean those not let under any short term lease". His position is therefore that he should not have to contribute service charges for flats that are let on AST's.

19. That is certainly the position his advisers have taken in their email of 13 January 2019 to the Applicant's solicitor. The argument is that if occupation is under an AST, the flat is "let", so that clause 8.6 no longer applies.

Discussion

20. The key clause that we are being asked to consider is clause 8.6 in the lease. Does it oblige the Respondent to pay the maintenance contribution in respect of the Non-contributing Flats?

21. The Respondent of course suggests that it does not. We agree that the Non-contributing Flats are all let on AST's, so we can see the argument the Respondent is putting forward, to the effect that therefore clause 8.6 no longer applies.

22. But we cannot agree that this means the Respondent is not obliged to pay the maintenance contribution for those flats.

23. We go back to *Arnold v Britton*. We need to consider what a reasonable person with all the background knowledge which would have been available would have understood the words "unsold or unlet" to mean. There are two possibilities; either "unlet" means "unlet on the same terms as all the other flats (including an obligation to contribute towards the maintenance contribution)", or it means "unlet at all – i.e. vacant". The single phrase "unsold or unlet" does not on its own clarify which of these meanings was intended.

24. We believe the intention behind clause 8.6 is plain. When setting up a development of multiple flats, there is always a risk for the first lessees that the whole development will not be sold, and the early lessees may end up having to pay a disproportionate part of the service charge until every flat has a contractual obligation to contribute. The usual solution is to impose an obligation upon the developer or landlord to pay until the final letting. By doing this, 100% of the service charge, or maintenance contribution is collectable from day one. We consider that this is the clear purpose of clause 8.6.

25. This interpretation of the lease is reinforced by the expression of intention contained in the recital to the lease; the plan was to let all the "Flats" (that definition expressly being all 12 flats together). And the other sub-clauses in clause 8 that are quoted above also show that there was an intention for the Property to be fully let on the same terms as are set out in the lease granted to the Lessees. Also, the maintenance contribution that every lessee was intended to make was to be an equal amount for each of the "existing lessees", which we think is clearly intended to refer to the lessees in a fully let development.

26. If the Applicant, as manager, is only able to collect 75% of all the costs it incurs, it become immediately obvious that the Property is commercially unmanageable.

27. We therefore determine that when we consider all the provisions of the lease, the overall purpose of clause 8.6, the intention in the lease for all flats to be let on the terms of the lease to the Lessees, and the commercial impact of any other interpretation of clause 8.6, the correct interpretation of that clause is that the Respondent must pay the maintenance contribution for all flats not let on the same terms as the leases granted to the Lessees.

What sum is payable?

28. The Applicant has not in fact asked for a determination of the amount payable by the Respondent for the Non-contributing Flats. In correspondence copied within the Applicant's submissions, there is a claim for arrears of £19,959.24 plus interest.

29. In his submission, the Respondent claims that he had not been provided with service charge accounts and records breaking down the sums sought from him and requesting monies individually considered to be due from him for any unlet properties.

30. The Tribunal has not been provided either with accounts or copy invoices for specific amounts said to be due from the Respondent. It is also the case that the Applicant expressly limited this application to a determination of the principle of contribution, rather than determination of specific amounts. We therefore make no determination of any specific amount that is payable by the Respondent. If the parties are not able to resolve what sums are due from the Respondent, a further application to the Tribunal could be made.

Summary of determination

31. In respect of any flats at the Property that are unlet on a long lease in the same or similar terms to the lease of Flat 3 which the Tribunal has considered in this decision, the Respondent is liable to pay to the Applicant the maintenance contribution which would have been payable by the lessee of those flats had they been let on those lease terms.

Appeal

32. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)