UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – whether costs incurred in objecting to planning permission were recoverable through service charge – natural justice and procedural fairness – whether costs of directors' and officers' insurance and administration of leaseholder owned corporate landlord recoverable through service charge – appeal allowed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

CHISWICK VILLAGE RESIDENTS LIMITED

Appellant

and

JOHN ROBERT FRANCIS SOUTHEY

Respondent

Re: 255 Chiswick Village,
London,
W4 3DF

Martin Rodger QC, Deputy Chamber President

Royal Courts of Justice

11 April 2019

Nicholas Isaac QC, instructed by Machins Solicitors LLP, for the appellant
Owen Williams of Clarke Willmott LLP, for the respondent

The following case is referred to in this decision:

Solar Beta Management Company Limited v Akindele [2014] UKUT 0416 (LC)

Introduction

1. This appeal, which is brought with the permission of the First-tier Tribunal (Property Chamber) ("The FTT"), is against a decision of the FTT made on 19 February 2018 by which it determined questions concerning the liability of the respondent, Mr J F R Southey, to pay service charges under his lease of a flat at 255 Chiswick Village, London W4.

2. Chiswick Village is a 1930's development comprises a number of buildings containing 280 self-contained flats held on long leases. The freehold interest in the development, which is the reversion to those leases, was acquired in 1997 by the appellant, Chiswick Village Residents Ltd ("CVRL"), a company wholly owned by the leaseholders themselves.

3. After acquiring the freehold CVRL offered its members 999-year leases of their own flats in the development at peppercorn rents. By the time of the hearing before the FTT all but two flats were held on such leases and CVRL's sole income comprised ground rents of £150 and such sums as it was entitled to collect through the service charge.

4. The proceedings before the FTT arose out of an application made by Mr Southey on 29 September 2017 in which he raised four separate issues relating to the service charges recoverable for the years 2013-2018. Only two of those issues remained contentious in this appeal.

5. The first issue concerns professional fees totalling £64,962 incurred by CVRL in connection with two applications for planning permission made by Dandy Properties Ltd, which has a lease of the roof space above the Chiswick Village buildings which it sought planning permission to develop by the addition of a further 15 penthouse flats. CVRL opposed that application. A second application for permission to develop a further 11 flats on a carpark in the grounds of Chiswick Village was also opposed by CVRL. Mr Southey asked the FTT to determine whether the costs incurred by CVRL could properly form part of the service charge.

6. The second issue concerns expenses incurred by CVRL in procuring liability insurance for its directors and officers, in organising its own AGMs and hiring premises for that purpose, and in taking advice on the conduct of meetings and on its entitlement to exclude certain individuals whom it considered likely to disrupt the proceedings. CVRL's expenditure totalled £7,605.65 on those items in the years under consideration and Mr Southey asked the FTT to rule whether that cost could properly be included in the service charge.

7. By its decision given on 19 February 2018 the FTT concluded that, in principle, the standard form of lease entitled CVRL to recoup through the service charge the cost of professional fees incurred in connection with the planning application. It nevertheless considered that only £10,000 of the total of £65,000 was "reasonable and payable". The FTT also decided that the lease did not allow the recovery of directors' and officers' insurance or the other corporate expenditure incurred by CVRL.

The leases

8. Mr Southey's lease is in the standard form used for flats at Chiswick Village and grants a term of 999 years at a peppercorn rent. The lessor was CVRL and the expression "the Lessor's Property" is defined as the land and buildings comprised in the blocks of flats known as Chiswick Village. The expression "the Building" meant the main and ancillary buildings standing on the Lessor's Property.

9. By clause 4 of the lease the lessee covenants to pay a "Maintenance Contribution" equal to a specified proportion of the aggregate annual maintenance provision for the whole of the Lessor's Property computed in accordance with the Fourth Schedule. The specified proportion in the case of Mr Southey's lease is 0.3602%.

10. Part 2 of the Fourth Schedule 4 identifies the expenses incurred by the Lessor which may be recouped through the Maintenance Contribution. These include expenses incurred in the performance of the obligations under clause 6A of the Lease one of which requires the Lessor to keep the Building insured against all the usual risks. By paragraph 4 of Part 2 they also include the expenses of:

> "Effecting insurance against the liability of the Lessor to third parties and against such other risks and in such amount as the Lessor shall think fit (but not against the liability of individual tenants as occupiers of the flats in the Building)."

11. Two other heads of expenditure mentioned in Part 2 of the Fourth Schedule are of relevance to this appeal. Paragraph 7 comprises:

> "All legal and other costs incurred by the Lessor including those relating to the recovery of maintenance contribution and other sums due from the Lessee:
>
> (a) in the running and management of the Building and in the enforcement of the covenants conditions and regulations contained in the leases granted of the flats in the building …"

Paragraph 8 comprises:

> "All costs incurred by the Lessor (not hereinbefore specifically referred to) relating or incidental to the general administration and management of the Lessor's Property including any interest paid on any money borrowed by the Lessor to defray any expenses incurred by it."

The first issue: the FTT's consideration of professional fees

12. The first issue in the appeal raises a short point of procedural fairness or natural justice.

13. In directions for the determination of the dispute given by the FTT on 7 November 2017 it had identified the issues to be determined by it as those set out in a letter from Mr Southey dated 22 September 2017 which had accompanied his application. Mr Southey had there described the first of three issue which he wished to have resolved as follows:

> "Money belonging to the service charge has been used to fund lawyers and surveyors to try to stop any development happening on any part or even near Chiswick Village. While it is the right of anyone to either object or support a planning application personally, that individual cannot spend money intended to maintain other property doing so."

The FTT also included a standard paragraph in its directions describing the issue as "whether the works are within the landlord's obligations under the lease/whether the cost of works are payable by the leaseholder under the lease". The FTT did not identify any separate issue concerning the reasonableness of the costs incurred. In his submissions on the appeal Mr Williams helpfully acknowledged that Mr Southey had not questioned whether those costs were reasonable and the issue he had identified was whether the costs related to the planning process were allowable as service charge expenditure in principle.

14. After an oral hearing the FTT issued its first decision on the application on 19 February 2018. In paragraphs 17 to 19 of that decision it dealt with the recoverability of the costs of the professional advice obtained by CVRL concerning the planning applications. With regard to the application concerning the development of the roof space it first noted that the lease of the roof space granted by CVRL's to Dandy Properties Ltd anticipated that, subject to the Lessor's permission, structural work would be carried out to create flats in the roof space. This suggested to the FTT that it was "futile" for CVRL to object to the proposed development. It nevertheless considered that it was reasonable for the CVRL to take an interest in any developments that may affect the Building. It had "an understandable desire to be informed about the details of a development on top of its Building". For that reason, the FTT was satisfied that the costs were recoverable under paragraph 8 of Part 2 of the Fourth Schedule as costs incurred for purposes "relating or incidental to the general administration and management of the Lessor's Property"; although general the FTT considered those words were sufficiently clear to allow recovery of the disputed expenditure.

15. At paragraph 19 of its decision the FTT continued:

> "However, the tribunal was not satisfied that the amount claimed was reasonable. We were provided with supporting invoices in respect of the advice and assistance sought in registering objections to the roof space development. It appears to us that in circumstances where the Lessor granted the lease for the roof space with the anticipation of "construction of a flat or flats at the demised premises" as set out by paragraph (N), it cannot in our view be reasonable for the Lessor to now turn around and expend what could be regarded as a considerable sum of money objecting to the construction of what was in fact anticipated. The invoices submitted show "advice - proposed roof development" appearing in each service charge year which suggests an element of repetition. The tribunal accepted that the Lessor was entitled to make observations but in our view, had such a course been adopted, it was unlikely to have resulted in the Lessor incurring this considerable sum now claimed. Having examined the supporting invoices, which provide no detailed information of the work carried out, the tribunal adopted a broad-brush approach and concluded that the sum of £10,000 is reasonable and payable and the applicant is liable to contribute towards this cost as apportioned by the applicant's lease."

16. The FTT then considered professional fees incurred in opposing the application for planning permission to develop a car park in the grounds of Chiswick Village which it found were not recoverable through the service charge at all.

17. CVRL informed the FTT that, of the total sum of just under £65,000 spent on professional fees, £51,354.04 was spent in opposing the application to develop the roof space. At the hearing of the appeal I understood Mr Isaac QC, who appeared on behalf of CVRL, to submit that it was that sum which CVRL seeks to recover through the service charge instead of the £10,000 allowed by the FTT and that it does not now seek to include the balance of the total which had been incurred in opposing the development of the car park.

18. CVRL asked the FTT for permission to appeal its decision on this issue on the grounds that it had determined an issue which was not in dispute between the parties, namely the reasonableness of the amount of the professional fees. Mr Southey had not challenged the reasonableness of the fees and the FTT had not identified them as an issue either at the case management hearing or during the substantive hearing. CVRL had not prepared evidence to defend the reasonableness of the charges or to explain in any detail what work had been carried out.

19. When it received the application for permission to appeal the FTT invited Mr Southey to respond but it subsequently appeared that the FTT's request had never reached him. It was therefore without the benefit of any representations from him that the FTT decided on 24 May 2018 to review its decision of 19 February and to set aside paragraph 19, which it described as its decision "that the costs claimed in respect of opposing the planning application were not reasonable." It accepted that Mr Southey had not challenged the reasonableness of the amount of professional fees incurred by CVRL and that it had therefore erred in law in determining an issue that was not in dispute between the parties.

20. Unfortunately, Mr Southey had not received the FTT's invitation to make representations before it decided to undertake the review. When he was notified of its second decision he responded by inviting the FTT to exercise its power under rule 51 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 to set aside its review decision on the grounds that a document sent to him had not been received and that it was in the interest of justice for the decision to be set aside.

21. On 20 August 2018 the FTT made a further decision setting aside its decision of 24 May reinstating its decision of 19 February. Rather than undertaking a further review of its original decision the FTT granted CVRL permission to appeal that decision.

22. Since the FTT had acknowledged in its decision of 24 May 2018 that it had "erred in law in determining an issue that was not in dispute between the parties", Mr Isaac had a firm platform on which to base his submissions in support of CVRL's appeal. He referred to well-known authorities to the effect that the FTT is not entitled to raise an issue that has not been raised by the parties themselves without giving the parties an opportunity to address that issue. That was simply a matter of natural justice. In this case the FTT had raised the issue of reasonableness of the professional fees of its own accord and had determined it without giving the parties an opportunity to adduce relevant evidence or make submissions. Had CVRL been

alerted to the need to do so, it would have been in a position to explain what detailed work had been undertaken by its professional advisers by producing timesheets and narrative bills in support of the summary information contained in their invoices. Moreover, Mr Isaac submitted that the FTT had applied an arbitrary reduction without any evidence to justify it.

23. On behalf of Mr Southey, Mr Williams accepted that, if the FTT had in fact decided that the professional fees incurred in relation to the application for planning permission were unreasonable, it had done so without exploring that issue at the hearing or giving the parties the opportunity to address it, and in circumstances where the applicant himself had not directly raised the issue. Nevertheless, Mr Williams submitted, on a fair reading of the FTT's decision as a whole it had not committed the error of which it is accused by CVRL and which, initially at least, it appears to have acknowledged.

24. What the FTT had in fact done, Mr Williams submitted, was to conclude that the course of action taken by CVRL (rather than the associated cost) was unreasonable or improper and that, if it had limited its intervention to the extent that was permissible, the cost which it would have incurred would have been only £10,000. That was apparent from the FTT's description of the objections by CVRL as "futile". Whether "futile" was the appropriate word or not, it was apparent from paragraph 17 of its decision that the FTT was concerned that the lease of the roof space had been granted in the expectation that flats would be constructed there. The FTT decided that it was reasonable for CVRL "to express an interest in the development that may affect the Building". It was on that basis that it regarded the costs incurred as costs "relating or incidental to the general administration and management of the Lessor's property". It was true, Mr Williams acknowledged, that the FTT had begun paragraph 19 of its decision by saying that it was not satisfied "that the amount claimed was reasonable" but on examination of the explanation it then gave it was apparent that it was not concerned so much with the quantum of the charges as with the propriety of CVRL spending money objecting to a development which was specifically contemplated by the terms of the roof space lease it had granted.

25. Skilfully though Mr Williams developed these submissions in writing and, with admirable brevity, orally, I do not accept that they provide an answer to CVRL's central complaint that they were denied the opportunity to address the FTT's concerns about the quantum of the professional fees.

26. It is clear that in paragraph 18 of its decision the FTT was addressing the question whether CVRL had a contractual right to recoup professional fees incurred in informing itself about the details of the proposed development and in understanding how it would affect the remainder of the building. Although it expressed itself tentatively in saying that "it could be argued" that it was necessary for CVRL to take some action to ensure the proposed development did not have an adverse impact on the rest of the building, it is apparent that the FTT was sympathetic to that argument. Mr Williams did not challenge the FTT's conclusion that professional fees spent in understanding the potential consequences for other leaseholders were legitimate items of expenditure under paragraph 8 of Part 2 of the Fourth Schedule.

27. I accept Mr Williams submission that in paragraph 19 of its decision the FTT was not simply addressing the reasonableness of the sums incurred. Its concern on that front arose because of the brief description of the subject of the instruction in the invoices, which the FTT

took to suggest "an element of repetition" and included "no detailed information of the work carried out". But interweaved with that consideration the FTT returned to the point it had made in paragraph 17, that it was not reasonable for CVRL to spend money objecting to a development on the roof of the building which it had facilitated by the lease it had granted in anticipation of just that development. The absence of detail in the invoices contributed to the difficulty which the FTT had in identifying how much of the professional fees had been expended in what it regarded as a legitimate effort to obtain information and to understand the consequences of the proposals, and how much had been spent in the unreasonable pursuit of objections to the proposals in principle.

28. What I do not accept, however, is that the FTT was entitled to make the distinction it did, between permissible and impermissible expenditure on professional fees, without alerting the parties to its concern and allowing them an opportunity to address it. The distinction was not one which Mr Southey himself had raised in his application. The question he had asked the FTT to decide was a much simpler one: could CVRL use the service charge to pay professional advisers to oppose a planning application? Although expressed slightly differently in his letter of 22 September 2017 the issue was reasonably understood by the FTT (when it gave directions) and by CVRL as a question of principle and not as involving a line by line consideration of individual invoices to determine whether the amount claimed was reasonable.

29. I am influenced in this conclusion by the FTT's acknowledgement in its decision of 24 May 2018 that it had erred in law in determining the reasonableness of the amount of the professional fees incurred by CVRL when that was an issue which Mr Southey did not challenge. The fact that the FTT accepted that it had exceeded the limits of the issue argued before it, and had done so without affording the parties a proper opportunity to address it on the issue which concerned it, is an insuperable obstacle to Mr Williams' submissions.

30. I am therefore satisfied that the FTT reached its decision in a manner that was inconsistent with the requirements of natural justice and that the appeal must be allowed and paragraph 19 of its decision set aside.

31. There then arises the question of what this Tribunal should do. Mr Southey's proportion of the disputed professional fees is £234. As the FTT pointed out in its case management decision, no other Lessee of Chiswick Village has raised any objection. Since the issue of principle raised by Mr Southey was sufficiently answered by paragraph 18 of the FTT's decision, and since the sum in dispute is so modest, I have concluded that it would not be proportionate to put the parties to the expense of a further hearing at which the FTT could consider the issue which clearly troubled it but which it had not been asked to determine. The appropriate course of action in this case is simply to allow the appeal on the first issue.

The second issue: directors' and officers' insurance and other corporate expenses

32. The second issue raised by the appeal is in two parts. The first concerns CVRL's entitlement to recoup the cost of the directors and officer's insurance it obtains for its members who assume those responsibilities. The second concerns expenses of a more administrative nature incurred by CVRL.

33. The total expenditure involved over the 5 years in dispute is only £7,605.65, of which Mr Southey's proportion is just £27.39. The sums involved are modest, but both aspects of this issue are regularly encountered in cases concerning leaseholder owned landlords and management companies; the same issues can arise, though much less frequently, where corporate expenses are incurred by landlords with no leaseholder membership.

Insurance

34. Although issues concerning the recoverability of directors' and officers' insurance and corporate administrative are quite common, they are not amenable to a single answer. Like all questions involving liability to pay service charges, the answer depends on the terms of the particular agreement under which the liability is said to arise.

35. The FTT's decision in this case was that paragraph 4 of Part 2 of the Fourth Schedule to the lease did not permit the recovery through the service charge of directors' and officers' insurance premiums because the directors and officers were separate persons from CVRL itself and insurance taken out for their benefit was not "insurance against the liability of the Lessor". As far as the corporate expenses were concerned the FTT found that these were not within paragraph 8. For good measure they were not "service charges" within the section 18(1), Landlord and Tenant Act 1985, which refers to an amount payable by a tenant of a dwelling "directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management".

36. Mr Isaac put CVRL's case on insurance on two alternative bases.

37. He first proposed that the reference in paragraph 4 to "the liability of the Lessor" could be read in an extended sense as including the liability of its directors and officers because a company cannot do anything except through the activities of its directors and officers or others engaged by them. I do not accept this submission, for the reasons advanced by Mr Williams. The expression "the Lessor" is defined in the lease as meaning CVRL or its successors in title. The parties having provided their own definition, it is not appropriate to give the defined expression a wider meaning, especially where that wider meaning is not one which the defined term would naturally have. Secondly, the liabilities referred to in paragraph 4 and against which insurance may be obtained at the expense of the leaseholders are liabilities "of the Lessor to third parties". That is not apt to describe directors' and officers' insurance which is often relied upon by the directors in connection with liabilities towards the company itself. I am satisfied that the first limb of paragraph 4 only authorises the recoupment through the service charge of the cost of insurance against liabilities of the Lessor itself.

38. However, as Mr Isaac pointed out in his alternative submission, paragraph 4 is in two parts, the second of which is not limited to insurance against the liability of the Lessor but extends to insurance against "such other risks and in such amount as the Lessor shall think fit (but not against the liability of the individual tenants as occupiers of the flats in the Building)". The words in brackets, excluding the possibility of the Lessor taking out insurance against the liability of individual tenants "as occupiers of flats", indicate clearly to my mind that the second limb contemplates the Lessor obtaining insurance against liabilities of persons other than the Lessor itself, including liabilities of leaseholders incurred in any capacity other than as the occupier of a flat. On that reading of the paragraph insurance against the liability of the Lessor to

third parties is one permissible head of expenditure, and insurance against other risks is a separate head of expenditure which is not limited by reference to the identity of the person whose liability is to be insured against. It seems to me that to give the paragraph as a whole a narrower interpretation, so that it only permitted recovery of the expense of insuring the liabilities of the Lessor to third parties and in respect of other risks, would render the words in brackets redundant.

39. Mr Williams submitted that a power to insure "other risks" was not a power to insure "other people". I accept that proposition, but it does not address the second limb of paragraph 4 which does not identify the person whose liability is to be insured.

40. In my judgment, in the context of the leases in issue this case, all of which were granted by a leaseholder owned and managed company, the language of paragraph 4 of Part 2 of the Fourth Schedule is apt to cover the cost of the Lessor obtaining insurance against the liabilities of its own directors and officers. The structure of the paragraph allows for insurance against liabilities of persons other than the Lessor itself, although the Lessor would have to act reasonably in determining that it was appropriate to obtain such insurance. In the context of a landlord which is wholly owned by the leaseholders of flats in the building and which has no other assets or interests, an obvious risk against which it might wish to insure is the risk of its own directors being sued. Without such insurance it would be difficult to find individuals willing to take office or for the company to function at all unless the directors were to be expected to obtain insurance at their own expense despite providing their services voluntarily and for the benefit of their fellow leaseholders. There is therefore no reason why the Lessor should not obtain it, at the expense of the leaseholders.

Corporate expenses

41. The FTT was satisfied that the corporate expenses of running AGM's, including taking advice on procedure at those meetings, did not fall within paragraph 8 of Part 2 of the Fourth Schedule because they were not incurred by CVRL in the administration and management of the Lessor's property. They were incurred in the administration and management of the Lessor itself.

42. The FTT did not consider paragraph 7 of the same schedule which allows the recovery of legal and other costs incurred by the Lessor in the running and management of the Building. That provision is open to the same objection, namely, that the costs of corporate administration are incurred in managing the company and not its property.

43. Mr Isaac referred to the decision of this Tribunal (HHJ Gerald) in *Solar Beta Management Company Limited v Akindele* [2014] UKUT 0416 (LC), part of which concerned the entitlement of a tenant owned management company (not a landlord) to recoup the administrative expenses incurred by its own directors through the service charge. The leaseholders were obliged to become members of the company. The costs in dispute were described as the "not unsurprising incidental costs of photocopying, printing, postal services and the odd piece of travel". In paragraph 29 of its decision the Tribunal regarded it as significant that the company was "a single-purpose tenant-owned company" which was obliged to provide and perform the services to which the service charge related. It had no source of income other than the service charge and would become insolvent if it incurred expenses which it could not recoup from that source. It

was only through the activities and decisions of its directors that the company was able to discharge its contractual duties, either by appointing and supervising managing agents or by doing some or all of the work of management itself. The directors were responsible for complying with the provisions of the Companies Act and other relevant regulations, non-compliance with which would result in the company being struck off and being unable to perform the obligations conferred on it by the lease.

44. The Tribunal considered that managing the Building and managing the company overlapped to some extent, saying at paragraph 32, that "There is no sensible distinction between the two because there cannot be one without the other, and the obligations and functions overlap and are all integral to the management of the Estate."

45. I am satisfied that it is legitimate to apply the same approach in this case. General administration and management of CVRL's property could not take place if CVRL itself was not managed. The company existed for one purpose only, namely to administer, manage and run the building on behalf of its members. All of the corporate governance activities of the company contribute to its own continuance and therefore to the achievement of that purpose, and all expenditure by the company on those activities is directed towards the same purpose. In circumstances where CVRL was intended to have no income producing assets of any significance and was to be owned by the leaseholders themselves I find no difficulty in accepting that the parties to the lease are unlikely to have intended any clear distinction between the management of the company and the management of the estate. In that context the language of paragraphs 7 and 8 is apt to include within the service charge the expenditure necessarily incurred by CVRL in conducting its own AGMs and in obtaining advice, on the basis that it was incurred in the running of the building, or was related or incidental to the general administration and management of Chiswick Village.

46. I therefore consider that the FTT took too narrow a view, in the circumstances of this lease, of the costs which CVRL is entitled to recoup through the service charge and I allow the appeal on the second issue.

Martin Rodger QC

Deputy Chamber President

8 May 2019