CASE REF: LON/00BG/LVM/2021/0010

IN THE FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

RE: CANARY RIVERSIDE ESTATE, WESTFERRY CIRCUS, LONDON E14 ('the Estate')

B E T W E E N:-

SOLOMON UNSDORFER

Applicant

-and-

(1) OCTAGON OVERSEAS LIMITED ('OCTAGON')

(2) CANARY RIVERSIDE ESTATE MANAGEMENT LIMITED ('CREM')

(3) RIVERSIDE CREM 3 LIMITED ('RIVERSIDE')

(4) CIRCUS APARTMENTS LIMITED ('CAL')

(5) LEASEHOLDERS REPRESENTED BY THE RESIDENTS ASSOCIATION OF CANARY RIVERSIDE ('RACR')

Respondents

MANAGER'S APPLICATION FOR PERMISSION TO APPEAL AND GROUNDS FOR APPEAL

Introduction

1. The Manager seeks permission to appeal the Tribunals' decisions dated 13th May and 27th July 2022, as to the scope of paragraph 27 of the Functions and Services to the Management Order dated 12th April 2019 ('the Paragraph' and 'the EMO' respectively).

2. The Tribunal erred in that its construction of the Paragraph was an error of law or alternatively, a construction that no reasonable Tribunal could have made.

3. The Paragraph permits the Manager to seek the costs of the original s.24 proceedings and subsequent s.24 proceedings (such as the applications to extend and vary) from both the residential and commercial leaseholders.

The Paragraph

4. The Paragraph is in the following terms (emphasis, including spacing, added):

The Manager is entitled to be reimbursed in respect of reasonable costs, disbursements and expenses (including, for the avoidance of doubt, the fees of Counsel, solicitors and expert witnesses)

of and incidental to

*any application or proceedings **(including these proceedings)** whether in the Court or First-tier Tribunal,*

to enforce the terms of the Leases, the Commercial Leases and/or any Occupational Agreement of the Premises.

For the avoidance of doubt, the Manager is directed to use reasonable efforts to recover any such costs etc directly from the party concerned in the first instance
and
will only be entitled to recover the same as part of the service charges in default of recovery thereof.

The Tribunals' Decisions

5. In their decision of 13th May 2022 ('the First Decision'), the Tribunal determined:

   a. That there was a drafting error in that 'service charges' should have read 'Service Charges' and was therefore a defined term in the EMO (paragraph 60). A point not challenged on this appeal by the Manager;

   b. Whilst the s.24 application had been made by residential leaseholders, they further determined at paragraph 60 that:

   "..*it would make no sense for the Manager's ability to recover legal costs incurred in enforcing a commercial lessee's obligations regarding Shared Services, to be*

restricted to recovery from residential lessees only. As such, we determine that paragraph 27 allows for the recovery of legal costs from commercial lessees where:

(a) the legal costs were incurred in enforcing the terms of the Leases, including the Commercial Leases and/or any Occupational Agreement;

(b) the costs are of, or incidental to, any application or proceedings whether before a Court or this tribunal. We do not agree that the paragraph accords a carve out solely in respect of the original s.24 application. There is nothing in the wording that excludes the costs of any subsequent application under s.24(9) to vary the EMO;

(c) the Manager has been unsuccessful in attempts to recover those costs from the defaulting lessee; and

(d) the enforcement action taken related to the provision of a Shared Service by the Manager."

References to (a) to (d) in this application are references to these alphabetised criteria.

6. As a result of that the First Decision, the Manager remained uncertain as to the scope of the Paragraph and made a further application with regard to the construction of the Paragraph ('the Second Application'). In the Second Application he posited five scenarios for consideration as to whether costs would be recoverable from the commercial leaseholders, including

   a. the original s.24 application to appoint a manager ('Section 24 Costs');

   b. the current ongoing applications to extend the term of the EMO ('the Extension Costs');

   c. a recent application that arose out of the insolvency of the Virgin gym located on the estate ('the Bad Debt Costs'); and

d. the ongoing applications to vary the EMO ('the Variation Costs').

7. On 27th July 2022, the Tribunal provided their decision on the Second Application ('the Second Decision') in that they determined that the Bad Debt Costs were within scope. As to the others, they considered (emphasis added):

a. Section 24 Costs:

17. … for either pre-appointment, and post-appointment costs to be recoverable, the Manager would need to satisfy the tests at sub-paragraphs (a), (b), and (d) of paragraph 60 in order for them to be recoverable from commercial lessees under paragraph 27. ***The test at sub-paragraph (c) is automatically met as there is no defaulting lessee from whom such costs could be recovered.*** *Mr Bates suggests that pre-appointment costs cannot be charged to anyone. However, it appears to us that they arguably fall within the scope of paragraph 27 if it can be established they were costs "of and incidental" to the original s.24 application,* ***and the criteria at sub-paragraphs (a), (b), and (d) of paragraph 60 are met****.*

18. … The hurdles that it appears the Manager would need to overcome are: ***(i) establishing that the costs were incurred in enforcing the terms of the Leases, the Commercial Leases and/or any Occupational Agreement; and (b) establishing that the costs were incurred in taking enforcement action relating to the provision of a Shared Service.*** *Nor is it entirely clear that the reference in paragraph 27 to "these proceedings" is limited to the original s.24 application, or whether it includes costs incurred in the subsequent applications to vary the management order.*

b. The Extension Costs:

"19. Again, the Manager would need to satisfy the tests at sub-paragraphs (a), (b), and (d) of paragraph 60 in order for them to be recoverable from commercial lessees under paragraph 27. Once again, ***the test at sub-paragraph (c) is automatically met as there is no defaulting lessee*** *from whom such costs could be recovered."*

c. The Variation Costs:

21 … the Manager would need to satisfy the tests at sub-paragraphs (a), (b), and (d) of paragraph 60 in order for them to be recoverable from commercial lessees under paragraph 27. ***Again, the test at sub-paragraph (c) is automatically met as there is no defaulting lessee from whom such costs could be recovered****. Areas of difficulty for the Manager appear to be demonstrating that sub-paragraph (a) is met, namely that the costs were incurred in enforcing lease terms, and also sub-paragraph (b), as the costs of the variation applications would only be potentially recoverable to the extent that they concern Shared Services*

Ground of Appeal

8. The Tribunal erred in its construction of the Paragraph for the following reasons.

Of an incidental to

9. The Tribunal failed to take into account properly or at all the import of the words '*of and incidental to'.* At paragraph 60, when it set out the criteria to be met, the Tribunal re-arranged the order in which the Paragraph was written. Instead of *'of and incidental to'* preceding and governing the scope of (a) (c) and (d), it was made separate to them. As a result, each of (a) (c) and (d) had to be satisfied before the costs were recoverable from the commercial leaseholders. It therefore narrowed the cost recovery to those proceedings directly involved in enforcing terms relating to the provision of shared services. By making each of these necessary criteria to be met, that had the effect of excluding cost recovery for the original s.24 proceedings, which were only incidental to enforcing those terms, but essential for that, in that they set the framework for such enforcement.

10. In that regard, the criteria should have been that paragraph 27 allows for the recovery of legal costs from commercial lessees where:

    (a) the costs are of, or incidental to, any application or proceedings whether before a Court or this tribunal, enforcing the terms of the Leases, including the Commercial Leases and/or any Occupational Agreement; and

(b) where they have been incurred in relation to the direct enforcement of the terms of a lease, then the Manager can only recover through the Service Charge where reasonable efforts have failed to recover the costs from the defaulting party.

Express reference to the s.24 proceedings

11. The Tribunal failed to take into account the fact that the Paragraph by making an express reference to the s.24 proceedings '*including these proceedings'*, provided that the cost of those proceedings were recoverable from the residential and commercial leaseholders as an absolute right, *without more*. Certainly without having to meet the (a), (c) and (d) criteria before doing so.

12. The Tribunal fell into error in placing 'hurdles' in the way of the Manager; namely (a) (c) and (d) before it could recover those costs from the commercial leaseholders. In doing so, if it was saying that all those criteria had to be satisfied independently, it effectively rendered meaningless the insertion of '*including these proceedings'*, as those proceedings were not the enforcement of terms as to Shared Services.

13. In that context, '*incidental to'* properly construed, provides for the Section 24 Costs to be recoverable, being incidental to any enforcement by the Manager of the lease terms.

Internal inconsistencies

14. At paragraphs 17, 19 and 21, the Tribunal accepted that (c) did not apply in cases, where there was no '*defaulting lessee'* from whom costs could be recovered. Further, that it therefore did not apply in the case of the costs of the original application to appoint a manager.

15. However, it then fell into error at paragraph 18 when it considered that in order for the Section 24 Costs to be recoverable from the commercial tenants, the Manager would have to show:

    a. That the costs were incurred '*in enforcing the terms of the Leases*' etc.

    That consideration does not follow from the Tribunals' acceptance that (c) does not apply in relation to those costs. The disapplication of (c) is predicated on the basis that there is no '*defaulting lessee*'. It logically follows that if there is no '*defaulting lessee*' then there is no term to enforce. This also supports the contention above,

that the Tribunal fell into error in not properly considering the import of *'of and incidental to'.* The Section 24 Costs were incidental to enforcing all of those terms and recoverable accordingly;

b. That the costs were incurred in taking '*enforcement action in relation to a Shared Service*';

For the same reasons, this is inconsistent with the view that (c) does not apply because there is no '*defaulting lessee'*. The recovery of the Section 24 Costs is of general application, it is not directed specifically to any term, but encompasses Shared Services; indeed the term is itself defined in the EMO which arose a result of the s.24 proceedings.

Extension and Variation Applications

16. The Tribunal also fell into error in respect of the Extension Costs and the Variation Costs.

17. Having determined at paragraph 60 (b) of the First Decision that the reference to '*these proceedings'* was not just to the original s.24 proceedings but also to further applications under s.24(9), it follows that if the Section 24 Costs are recoverable from the commercial leaseholders, so must the Extension Costs and Variation Costs, given that they both relate to the EMO in general terms, which includes Shared Services and enforcing lease terms relating to those services.

18. The Tribunals' error in respect of these two costs is the same as with the Section 24 Costs, in that it failed to give proper weight, if any, to the words *'of and incidental to'*. It was therefore wrong for the Tribunal to consider that there were '*Areas of difficulty*' in establishing that the costs were incurred in enforcing lease terms or that they related to Shared Services.

General points

19. If there is any ambiguity as to the scope of the Paragraph, which the Manager does not accept for the reasons given above, then that should be resolved in the construction contended for by the Manager, given that the Order was made in the following context:

a. The Section 24 Costs, Extension Costs and Variation Costs are all costs that are for the benefit of the estate as a whole, both residential and commercial, given that

the appointment of a manager is only made where there is serious default in management;

b. Whilst the commercial leaseholders cannot instigate a s.24 application, they are able to fully participate in any proceedings either as a Respondent or Interested Party. Indeed, during the lifetime of the EMO, they often have;

c. To deprive the Manager from properly apportioning costs, would be to unfairly place the financial burden on the residential leaseholders, who were instrumental in promoting the EMO for the benefit of the estate as a whole.

Conclusion

20. The Tribunal erred in narrowly construing the Paragraph. Properly read it permits the Manager unconditionally to recover the cost of the original s.24 proceedings as well as the more recent variation and extension applications from the commercial as well as the residential leaseholders.

DANIEL DOVAR
Tanfield Chambers

Dated this 23 day of August 2022

STATEMENT OF TRUTH

I believe that the facts stated herein are true. I understand that proceedings for contempt of Court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

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SOLOMON UNSDORFER, FIRPM
Parkgate Aspen Limited
The Applicant