Neutral Citation Number: [2017] EWHC 1281 (Ch)

Case No: C90LV0050

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
CARDIFF DISTRICT REGISTRY

Cardiff Civil Justice Centre
2 Park Street, Cardiff CF10 1ET

Date: 26/05/2017

Before :

HIS HONOUR JUDGE JARMAN QC

Between :

FREEHOLD MANAGERS (NOMINEES) LIMITED — **Claimant**

- and -

CELESTIA MANAGEMENT COMPANY LIMITED — **Defendant**

Mr Simon Allison (instructed by **JB Leitch Solicitors**) for the **claimant**
Mr Nathaniel Duckworth (instructed by **Clarke Willmot LLP**) for the **defendant**

Hearing dates: 16 May 2017

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE JARMAN QC

HH JUDGE JARMAN QC :

1. The parties are in dispute as to whether the defendant is liable to reimburse the claimant for estate service charges which the claimant has paid to the freeholder Associated British Ports (ABP) in respect of blocks of residential flats developed by Redrow Homes (South Wales) Limited (Redrow) and known as the Celestia development, which overlooks Cardiff Bay.

2. To carry out the development Redrow took an assignment of a 999 year headlease dated 20 December 2002 (the headlease). After constructing eight blocks of flats Redrow granted underleases (the underleases) of the individual flats to occupiers (the occupiers) for terms of 125 years. The defendant is a management company and is a party to the underleases. In the underleases, the occupiers covenanted to pay to the defendant certain charges, including those incurred for the decoration and repair of common hallway areas and the grounds around the blocks.

3. Between 2006 and 2008, Redrow transferred its interest in seven of the blocks to the claimant, retaining one (Block H) which was sublet as a whole to a housing association.

4. The dispute has arisen because by virtue of the headlease, the charges which the claimant is liable to pay to ABP include those incurred in the repair and maintenance of the access road to the development, a footbridge over a dock adjacent to the development, and a pathway between the grounds of the development and the adjacent docks, all of which are included in the demise under the headlease. I shall call these charges the disputed charges.

5. The underleases provide for the payment of charges referred to as the material charges, which are defined as the aggregate of the charges computed in accordance with the sixth schedule and payable under clause 3(4) by the tenant calculated in accordance with the square footage of the flat. That definition does not expressly include the disputed charges. However, Mr Allison, for the claimant, submits that such inclusion is effected by paragraph 3(4) of the seventh schedule. That schedule sets out the purposes for which the material charges are to be applied. Paragraph 3(a) under the heading "Payment of Outgoings," provides:

> "To pay all existing and future rates taxes duties assessments charges impositions and outgoings whatsoever whether parliamentary parochial local or of any other description which are now or during the term shall be assessed charged or imposed or payable in respect of the Development or its curtilage or Common Areas."

6. Mr Allison submits that that paragraph is very widely drafted and is wide enough to include the disputed charges and that the access road, footbridge, dock walls (as defined in the headlease) and pathway come within the meaning of the word curtilage. Both of those submissions are disputed by Mr Duckworth on behalf of the defendant.

7. The relevant principles of construction were not in dispute before me and may be summarised, as applied to the facts of this case, thus:

i) The court must consider the language used and ascertain what a reasonable person who has all the background knowledge reasonably available would have understood the parties to the underleases to have meant. The court ought generally to favour a commercially sensible construction (*Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 [2011] 1 WLR 2900).

ii) Leasehold covenant are to be construed by reference to the other terms of the lease and the background facts reasonably available to the parties at the time of grant (*Arnold v Brittain* [2015] UKSC 36).

iii) The clearer the natural meaning the more difficult it is to justify departing from it (*Arnold*).

iv) Service charge clauses are not subject to any special rule of interpretation. However, the court should not bring within the general words of a service charge clause anything which does not clearly belong there (*Arnold*).

v) There is no presumption that the landlord will recover all expenditure through service charges, but there is a presumption that no profit should be made from such recovery (*Campbell v Daejan Properties Ltd* [2012] EWCA Civ 1503).

vi) If the parties intend that the landlord shall be entitled to receive payment in addition to the rent, that obligation and its extent must be clearly spelt out in the lease, because the tenant will wish to be fully aware of any such obligation and the landlord will wish to make it clear as the obligation will subsist through successive ownerships of the reversion and the landlord will not wish to be out of pocket (*Francis v Phillips* [2014] EWCA Civ 1395).

8. The factors which the claimant relies upon in support of the contention that the disputed charges come within paragraph 3(a) are:

i) The charges which the tenant under the headlease must pay include the disputed charges and such tenant would wish to recover these in granting the underleases otherwise the yield from the development is reduced for no good reason.

ii) Redrow intended the occupiers to contribute to the costs of maintaining the access road as this was spelt out in information sheets given out to prospective purchasers.

iii) The easiest way to collect the disputed charges from the occupiers is for it to be charged by the defendant as part of the material charges.

iv) Express rights of way to use the access road, the footbridge and the pathway (each of which remains unadopted) are granted in the underleases to the occupiers.

v) Although the underleases in respect of Block H (which were granted prior to those in respect of the other blocks) make express provision for recovery of all charges to be paid under the headlease (under an identically worded heading to that above paragraph 3(a)), there would be no reason for the occupiers to

search that out prior to purchase. Alternatively, that shows an intention on the part of Redrow that all charges should be recovered from the occupiers.

vi) Although provisions similar to that in paragraph 3(a) are typically used to cover liability to pay charges imposed by public authorities, there is no reason to restrict the paragraph to such charges. The words "all...outgoings whatsoever,' 'of any other description,' and 'on or in respect of' are very wide and are to be contrasted with the narrower terms of clause 2(2) of the underleases. By that sub-clause the occupier covenants "to pay all rates taxes assessments charges impositions and outgoings" which may be "assessed charged or imposed" upon the demised premises.

vii) Properly construed, paragraph 3(a) operates as an indemnity for the claimant.

viii) Although there is no express mechanism in the underleases in relation to demands, information and balancing in respect of the disputed charges these are not insurmountable difficulties and the occupiers can always apply under the Landlord and Tenant Act 1985 to the appropriate tribunal for determination of what must be paid or reimbursed.

9. The following factors are relied upon by the defendant in support of a narrower construction:

i) There is no express provision for the occupiers to pay the disputed charges. Some other indication of such liability must be found in the underleases.

ii) Prospective occupiers would be entitled to know and would want to know what the occupiers of Block H are liable for. By comparing the respective provisions, such prospective occupiers would conclude that the absence of such a provision in the underleases in respect of other blocks meant that they would not have to pay the disputed charges.

iii) The provision in respect of Block H requires a fair proportion to be paid in respect of the disputed charges whereas paragraph 3(a) requires "all" charges to be paid. If the latter included the disputed charges and the same landlord collected under all of the underleases including those in respect of Block H, more than 100% of the disputed charges would be recovered.

iv) The underleases (other than those in respect of Block H) permit the defendant to discontinue any Seventh Schedule services if it reasonably considered it would be in the interest of the occupiers to do so if the services had become "impracticable obsolete unnecessary or excessively costly." The fact that the Block H underleases do not contain such an opt out shows that a different regime was intended for that block and the other blocks respectively.

v) With one exception, the covenants in respect of outgoings in the headlease and all the underleases (including those relating to Block H) require payment to be made to third parties rather than the landlord and the absence of such words in paragraph 3(a) would lead the parties reasonably to conclude that there is no obligation to indemnify the landlord.

vi) Paragraph 3(a) does not contain provisions as to whom or when payment should be made, or as to the provision of information in relation to the disputed charges. The defendant is a management company which cannot serve a notice pursuant to section 21 of the 1985 Act but if the claimant is right, has to administer the scheme for the occupiers who can serve such a notice.

vii) There is no correlative obligation on the landlord under the underleases to provide the services.

viii) The headlease does provide for payment on account of charges without providing for a balancing exercise. That is difficult enough in respect of such a bilateral arrangement, but if the disputed charges do come within paragraph 3(a), then administration of collecting and accounting to hundreds of occupiers would be burdensome and could not have been intended by the parties to the underleases.

10. Each of those factors in my judgment deserve some weight, but how much weight should be attached is another matter. The strongest indicators for the claimant's construction are those set out in sub-paragraph 8 i), v) and vi) above. The weakest in my judgment are those in sub-paragraphs 8 ii) and iv). Redrow's subjective intention in handing out information packs is not of great, if any, assistance in the determination of what a reasonable person with all the background knowledge reasonably available would have understood the parties to have meant by agreeing paragraph 3(a). Nor is the fact that the occupiers are granted rights of way in respect of the access road, footbridge or pathway. It is common ground that such rights must be exercised in common with members of the public.

11. The strongest indicators in favour of the defendant's construction are in my judgment those set out in sub-paragraphs 9 i), ii), vi) and vii) above. Those set out in 9 iii), iv) and viii) are not very strong. The difficulties there referred to are not insurmountable. The provision referred to in iv), in my judgment, applies only in very particular circumstances and is not a strong indication of a different regime.

12. In balancing all those factors, I have concluded that the defendant's construction is to be preferred. In so doing, in my judgment the one factor which tips the balance is the lack of clarity. If the claimant is right, then an occupier, in trying to understand what he or she must pay, is not directed to a covenant to pay a defined amount to a particular party at a particular time but must resort to a schedule which sets out the purposes for which the material charges (which are clearly defined) are to be applied. To bring the disputed charges within what the occupier must pay is to bring within the obligation to pay something which is not clearly there.

13. In case I am wrong about that, I should go on to consider whether in any event it can be said that the access road, footbridge and pathway (or any of them) to which the disputed charges relate come within the meaning of curtilage as used in paragraph 3(a).

14. The phrase used is "...the Development or its curtilage.." Accordingly, to come within that paragraph it must be shown that the access road, footbridge and pathway form part of the curtilage of the development. The development is defined in the

underleases as including the building and "the land surrounding the Building and the boundary walls and fences comprised in" the registered title of the headlease.

15. It is a matter of construction and regard must be had to the principles set out above. The word curtilage has been considered in a number of authorities. In *Lowe v First Secretary of State, Tendring District Council* [2003] EWHC 537, Sir Richard Tucker referred to dictionary definitions and concluded that the word connotes a building or piece of land attached to a dwelling house and forming one enclosure with it. It is not restricted in size, but must fairly be described as being part of the enclosure of the house to which it refers. In *Methuen-Campbell v Walters* [1979] QB 525, Buckley LJ put it in terms of requiring such an intimate association that whatever is said to be within the curtilage must form part and parcel of the dwelling.

16. On behalf of the claimant it is submitted that the access road, footbridge and pathway come within the paragraph, which contemplates a curtilage outside the development. These are small parcels of land immediate adjacent to the development and the access road is a necessary part of the development. There is no rule that a curtilage has to be enclosed with the building, but in any event the dock walls have the effect of enclosure. The fact that there are features such as walls fences and gates between the grounds and the pathway is not significant

17. For the defendant, it is said that given the definition of development in the underleases and that curtilage is usually understood to be connected to a building, the curtilage of the buildings on the development is already built into that definition. The access road, footbridge and pathway is not part and parcel of the development. They form part of thoroughfares connecting properties to the north east and west of the development, over which members of the public have access. It is common ground that they do, although the precise legal basis for that was not made clear in the evidence before me.

18. As Mr Duckworth accepted, his first submission if accepted would mean that the word curtilage in paragraph 3(a) is otiose. He relies on observation by Hoffman J as he then was in *Tea Trade Properties Ltd v CIN Properties Ltd* [1990] 1EGLR 155, to the effect that the presumption against superfluous language is not useful in the construction of leases as the drafters of leases traditionally use a number or words or phrases expressing more or less the same idea. I am not persuaded that such an observation is relevant to the phrase now under consideration. As indicated, the word development is precisely defined and the word curtilage following on as it does suggests a distinction is being made rather than expressing more or less the same idea.

19. Nevertheless, in my judgment none of the small parcels of land in question, taken alone or in combination, can fairly be described as part and parcel of the development. I accept that it is not necessary to show that they are enclosed with the development. However, they are more properly described as forming part of the thoroughfares giving access (including to the public) to and around the development and adjacent parcels of land, rather than forming part of the development. The fact that they fall outside the walls gates and fences which delineate the development is a significant factor. The necessary degree of intimacy is lacking.

20. Accordingly, the claimant has not made out its case. It is unnecessary for me to consider the arguments relating to apportionment which would only arise if the claimant's construction were accepted.

21. Counsel helpfully indicated that any consequential matters arising can be determined on the basis of written submissions, which should be filed within 7 days of handing down.