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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AE/LSC/2015/0329**
Property	:	**46 Lawns Court The Avenue Wembley Middlesex HA9 9PN**
Applicant	:	**Meena Bharat Dodhia (1)** **Bharat Kumar Dodhia (2)**
Applicant's Representative	:	**Mr V Jacob of Counsel**
Respondent	:	**Jehuda Goldenberg (1)** **41-50 Lawns Court Ltd (2)**
Respondents' representative	:	**Mr M Walsh of Counsel**
Type of Application	:	**Section 27A Landlord and Tenant Act 1985**
Tribunal Members	:	**Mrs F J Silverman Dip Fr LLM** **Mr D Jagger MRICS**
Date and venue of hearing	:	**11 November 2015 and 14 January 2016** **10 Alfred Place London WC1E 7LR**
Date of Decision	:	**19 January 2016**

DECISION

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1 The Applicant's application to strike out the Respondent's case is refused.

2 The Tribunal declares that the managing agent's fees of £20, 520 in respect of making an insurance claim do not fall within the scope of the consultation requirements under section 20 of the 1985 Act.

3 The Tribunal declares that the managing agents fees are recoverable under the terms of the lease.

4 The Tribunal declares that the managing agents fees are reasonable.

5 No order is made under s20C Landlord and Tenant Act 1985.

REASONS

1 The Applicants are the leasehold owners of the property situate and known as 46 Lawns Court The Avenue Wembley Middlesex HA9 9PN (the property) which is an apartment forming part of the building known as Lawns Court of which the first Respondent is the freehold owner, the second Respondent being the management company responsible for carrying out the landlord's maintenance covenants under the lease.

2 The Applicants issued an application in the Tribunal on 23 June 2015 asking the Tribunal to make a declaration under s27A Landlord and Tenant Act 1985 as to the reasonableness or otherwise of the Respondent landlord's service charges, including charges for major works, for the service charge year 2014 and the proposed service charges, for the current service charge year 2015.

3 Directions were issued by the Tribunal on 13 August and 11 November 2015.

4 The matter came before a Tribunal sitting in London on 11 November 2015 on which date there was insufficient time for the Tribunal to complete the hearing of the case and further Directions were issued which, inter alia, identified the issues to be decided as follows:

- Whether the managing agent's fees of £20,520 in respect of handling an insurance claim falls within the scope of the consultation requirements under section 20 of the 1985 Act.

- If so, should the Tribunal dispense retrospectively with the need for consultation?

- Whether the managing agents fees are recoverable under the terms of the lease.

- Whether the managing agents fees are reasonable.

5 The matters outlined in paragraph 4 above were the only service charge issues before the Tribunal at the resumed hearing on 14 January 2016 when the Applicants were represented by Mr V Jacob of Counsel and the first Respondent by Mr M Walsh of Counsel. The Tribunal heard oral evidence from Mr Dodia and for the first Respondent from Mr R Davidoff who manages the property on the landlord's behalf. The second Respondent is in liquidation and was not represented at the hearing. It was accepted by all

parties that in the absence of a management company the landlord is responsible for performing the repairing and management covenants contained in the lease and is entitled to the benefit of the tenants' covenants including the covenant to pay service charge. In these circumstances the application against the second Respondent was not pursued.

6 In the light of the limited nature of the matters to be decided by the Tribunal an inspection of the property was not considered necessary and was not undertaken by the Tribunal.

7 The Applicants claim is based on s27 Landlord and Tenant Act 1985, relating to the payability of and reasonableness of service charges as between landlord and tenant. Such a matter falls within the jurisdiction of the tribunal.

8 A bundle of documents was placed before the Tribunal for its consideration. Page references in this document are to pages in the bundle.

9 At the commencement of the hearing the Applicants made an application to exclude from the evidence copies of two management contracts which had been sent to them by the first Respondent under cover of a letter dated 8 January 2016. After discussion it was agreed that these two documents completed the chain of short term management agreements made between the first Respondent and his managing agent and were in identical form to those previously disclosed and contained in the hearing bundle . On that basis the Tribunal considered that they did not need to be put before the Tribunal at the hearing as they did not enhance the existing evidence.

10 The Applicants made an application under Rule 9 of the Tribunal Rules of Procedure to strike out the Respondents' case on the grounds that they had failed to comply with the Tribunal Directions. Specifically, they had failed to comply with Direction 6 of the Directions dated 13 August 2015 and with Direction 8 of the further Directions promulgated on 11 November 2015.

11 In response, the first Respondent's counsel argued that they had been unable to comply strictly with these Directions because the required information did not exist and they had supplied such information as was available namely, that Mr Davidoff had been paid in accordance with the provisions in his contract (see page 75) which allowed him to charge 10% plus VAT for handling insurance claims. No schedule of work was available and the matter had not been charged on an hourly basis.

12 Having adjourned to consider the matter the Tribunal decided to decline the Applicants' application for strike out. There had on the facts been a technical breach of the Directions which the Tribunal did not condone. The first Respondent's explanation was plausible and since no prejudice was asserted by the Applicants nor perceived by the Tribunal, striking out would in these circumstances be too harsh a penalty to impose.

13 Two discrete issues were debated in relation to the question of whether the managing agent's fees of £20,520 in respect of handling an insurance claim fell within the scope of the consultation requirements under section 20 of the 1985 Act. Firstly, the Applicants argued that because the sum in question exceeded the £250 per flat limit, consultation should have taken place in relation to the managing agent's contract. It was however demonstrated by the first Respondent that each of the short term contracts made between the first Respondent and ABC (the managing agents) was in identical terms and each was for a fixed term of less than one year (see eg p.109). The Applicants accepted this position and that consequently none of the contracts constituted long term qualifying agreements to which the consultation procedures would

be applicable. Further, since the sum of £20,520 related solely to the managing agent's fees and not to major (or indeed any) works, s20 had no application to it. No part of the works carried out using the funds recovered from the insurance claim were charged to the tenants, they could not therefore constitute 'major works' within the meaning of s20 and consultation was not required in respect of them. Since there had been no procedure to which s20 could have applied it was unnecessary for the Tribunal to consider any retrospective application for dispensation under s20ZA.

14 The Applicants also queried whether the managing agent's fees for handling a long standing insurance claim were recoverable under the terms of the lease. That question is clearly answered in the affirmative by paragraph 27 of the sixth schedule to the lease (page 39) which entitles the landlord or the management company to recover the costs, charges and expenses incurred by them in performing the obligations under the seventh schedule, the latter includes the costs of employing a managing agent (para 2(5) p43). Since the lease, at clause 5(e) (page 22) requires the landlord to insure, it follows that the managing agent's involvement in overseeing a claim under the insurance policy would be within his remit and is specifically addressed in the series of contracts between the first Respondent and the managing agents.

15 An allegation that the first Respondents, by paying the managing agent's fees, were in breach of clause 5(g) of the lease which requires them to apply all moneys to be received under any insurance claim in rebuilding was not actively pursued by the Applicants it seemingly being understood that none of the works which had been carried out as a result of the moneys recoverable from the insurance claim had been re-charged to the tenants and that the managing agent's fee was an additional item chargeable to the tenants under the service charge. In evidence before the Tribunal Mr Dodhia accepted that the insurance brokers' commission was not paid to the landlord or managing agent and that the brokers did not handle the insurance claim.

16 The question of the reasonableness of the managing agent's fees for overseeing the insurance claim was also in dispute between the parties. For the first Respondent it was argued that the fees were charged at the industry standard rate as sanctioned by the RICS Code. The Applicants argued that a lower rate was appropriate but produced no comparative evidence to support this assertion. Alternatively, the Applicants argued that the managing agent should only be entitled to 5/8 of their total fee because they had only been involved in the claim for that proportion of its duration. The Tribunal is satisfied that the managing agent's fee of 10% is within the bands of reasonableness for such items. Further, the clause in the managing agent's contract entitles the agent to a handling fee equating to 10% of the total insurance claim (p177). On the wording of the clause there is no provision for a proportion of the fee to be claimable or paid and no argument was put forward by the Applicants that the agent had not carried out his duties diligently. The Applicants did not dispute the first Respondent's evidence that the agent's involvement in the claim handling had resulted in a benefit to the tenants as a whole of some £130,000 which had enabled works which would otherwise have been chargeable to the tenants to be carried out without cost to them.

17 The Applicants made an application under s20C of the 1985 Act. This was opposed by the first Respondents whose conduct of the application could be subject of some criticism in that their delay in supplying information to the Applicants appears to have led to some misunderstandings. The Applicants however, persisted in pursuing a claim which was largely unsustainable and where the answers to their complaints could have been resolved without recourse to litigation. On the basis that the Applicant's claim has been wholly unsuccessful it would not be appropriate to make an order under s20C and the Tribunal declines to do so.

18 **The Law**

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
  (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
  (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
  (a) "costs" includes overheads, and
  (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
  (a) only to the extent that they are reasonably incurred, and
  (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;
and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,
   (d) the date at or by which it is payable, and
   (e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
   (a) the person by whom it would be payable,
   (b) the person to whom it would be payable,
   (c) the amount which would be payable,
   (d) the date at or by which it would be payable, and
   (e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
   (a) has been agreed or admitted by the tenant,
   (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
   (c) has been the subject of determination by a court, or
   (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
   (a) complied with in relation to the works or agreement, or
   (b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
  (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
  (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
  (a) an amount prescribed by, or determined in accordance with, the regulations, and
  (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be

regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
- (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
- (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
- (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
- (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
- (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
- (a) specified in his lease, nor

(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject matter of an application under sub-paragraph (1).

Orders for costs, reimbursement of fees and interest on costs

Rule 13 The Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013

(1) The Tribunal may make an order in respect of costs only—

(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in— (i) an agricultural land and drainage case,

(ii) a residential property case, or (iii) a leasehold case; or

(c) in a land registration case.

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Striking out a party's case

9.—(1) The proceedings or case, or the appropriate part of them, will automatically be struck out if the applicant has failed to comply with a direction that stated that failure by the applicant to comply with the direction by a stated date would lead to the striking out of the proceedings or that part of them.

(2) The Tribunal must strike out the whole or a part of the proceedings or case if the Tribunal—

(a)does not have jurisdiction in relation to the proceedings or case or that part of them; and

(b)does not exercise any power under rule 6(3)(n)(i) (transfer to another court or tribunal) in relation to the proceedings or case or that part of them.

(3) The Tribunal may strike out the whole or a part of the proceedings or case if—

(a)the applicant has failed to comply with a direction which stated that failure by the applicant to comply with the direction could lead to the striking out of the proceedings or case or that part of it;

(b)the applicant has failed to co-operate with the Tribunal such that the Tribunal cannot deal with the proceedings fairly and justly;

(c)the proceedings or case are between the same parties and arise out of facts which are similar or substantially the same as those contained in a proceedings or case which has been decided by the Tribunal;

(d)the Tribunal considers the proceedings or case (or a part of them), or the manner in which they are being conducted, to be frivolous or vexatious or otherwise an abuse of the process of the Tribunal; or

(e)the Tribunal considers there is no reasonable prospect of the applicant's proceedings or case, or part of it, succeeding.
(4) The Tribunal may not strike out the whole or a part of the proceedings or case under paragraph (2) or paragraph (3)(b) to (e) without first giving the parties an opportunity to make representations in relation to the proposed striking out.
(5) If the proceedings or case, or part of them, have been struck out under paragraph (1) or (3)(a), the applicant may apply for the proceedings or case, or part of it, to be reinstated.
(6) An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date on which the Tribunal sent notification of the striking out to that party.
(7) This rule applies to a respondent as it applies to an applicant except that—
(a)a reference to the striking out of the proceedings or case or part of them is to be read as a reference to the barring of the respondent from taking further part in the proceedings or part of them; and
(b)a reference to an application for the reinstatement of proceedings or case or part of them which have been struck out is to be read as a reference to an application for the lifting of the bar on the respondent from taking further part in the proceedings, or part of them.
(8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submission made by that respondent, and may summarily determine any or all issues against that respondent.

Judge F J Silverman as Chairman
Date 19 January 2016

Note:
Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.