

12077



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **MAN/00BY/LSC/2015/0122**

Property : **2 Bispham House
Lace Street
Liverpool
L3 2BP**

Applicants : **Ground Nominees Limited (1)
Acrophile Limited (2)**

Representative : **Mr Armstrong, Counsel
and JB Leitch, Solicitors**

Respondent : **Ms Karen Kelly**

Representative : **Weightmans LLP, Solicitors**

Type of Application : **Application for costs and application for the proceedings to be struck out**

Tribunal Member : **Judge J Holbrook**

Date and venue of hearing : **29 November 2016
Liverpool**

Date of Decision : **19 December 2016**

DECISION

DECISION

- A. **Ground Nominees Limited's application for a costs order is refused.**
- B. **Acrophile Limited's application for the proceedings to be struck out is also refused.**
- C. **Within 28 days of the date hereof, Acrophile Limited must comply with paragraphs 1 – 3 of the directions given in the Annex to the Tribunal's decision dated 8 June 2016.**

REASONS

Introduction

1. A second preliminary hearing in these proceedings was held in Liverpool on 29 November 2016. Its purpose was to deal with an application for a costs order made by Ground Nominees Limited ("GN"), together with a strike out application made by Acrophile Limited ("Acrophile"). GN and Acrophile are the original and substituted respondents respectively to an application for a service charge determination made by Ms Karen Kelly. However, it is Ms Kelly who is the respondent to these interlocutory applications.
2. Ms Kelly attended the hearing in person and gave oral evidence. She was represented by her solicitor, Ms Evans, from whom I heard oral submissions. I also received written and oral submissions for GN and Acrophile, both of whom were represented by Mr Armstrong of counsel. Judgment was reserved.
3. The Tribunal did not inspect the Property.

Procedural background

4. The story of these proceedings has not been a happy one to date as a number of avoidable errors have led to confusion, delay and additional complexity. The procedural history may be summarised as follows.
5. On 22 December 2015 the Tribunal received an application from Ms Kelly made under section 27A of the Landlord and Tenant Act 1985, by which she sought a determination of liability to pay and reasonableness of service charges in respect of the Property. Ms Kelly also applied for an order under section 20C of that Act, preventing the costs incurred in connection with these proceedings from being recovered as part of the service charge.

6. On 23 February 2016 I struck out the proceedings on the ground that there was no reasonable prospect of Ms Kelly's applications succeeding. The reason for this was that the named respondent (GN) was not the correct respondent to those applications. I declined to consider the merits of a second ground on which the strike out application had been made – which was that the service charge application was an abuse of process because the underlying dispute does not concern a service charge. It was unnecessary to consider this argument given my finding that GN was not the correct respondent. For the same reason, however, it was also inappropriate for GN to raise this as an issue as it has no interest in the relevant lease.
7. Ms Kelly had not responded to GN's strike out application prior to my decision. However, she subsequently applied for it to be set aside on the ground that her failure to respond was a result of the fact that she had not been made aware that the Tribunal had invited her to respond to the strike out application. The matter was considered at a preliminary hearing on 8 June 2016 when I agreed that my earlier decision should indeed be set aside. I accepted that Ms Kelly had not received the relevant email communication from the tribunal administration and that the reason why Ms Kelly had not received that email was that her email address had been mis-typed by the HMCTS case officer who had sent it.
8. I again declined to entertain submissions made on GN's behalf as to whether Ms Kelly's dispute with her landlord (which the parties had by then identified to be Acrophile) concerned a service charge, and I also refused GN's costs application as I was not satisfied that Ms Kelly had acted unreasonably either in making the initial application or in applying to have the strike out decision set aside.
9. At the same time, I directed that Acrophile should be substituted as the respondent to Ms Kelly's applications and, on 27 June 2016, a separate application was made on its behalf for the proceedings to be struck out as an abuse of process on the basis that the charge which is the subject of the dispute is not a service charge.
10. GN's solicitors, JB Leitch (who also now act for Acrophile), subsequently made a complaint about HMCTS' administration of the proceedings and this gave rise to a review of the administration of the proceedings by an HMCTS manager. That review identified the following salient facts:
 - a) The email address which Ms Kelly had supplied in her tribunal application form was: "kelly.k17882@outlook.com".
 - b) Receipt of the application was acknowledged by email sent to that address (Ms Kelly did not appoint a representative until late February 2016).

- c) On 29 January 2016 (at 10.32), a case officer attempted to send an email inviting Ms Kelly to respond to GN's strike out application within 14 days. Unfortunately, the email was incorrectly addressed – by reason of the omission of the “y” from “kelly”.
 - d) However, the case officer had evidently realised her mistake almost immediately and (at 10:42 on the same day) had resent the email to the address stated in (a) above.
11. On the face of it, therefore, it now appeared that Ms Kelly had been properly notified by email on 29 January that she should respond to GN's strike out application. Upon being made aware of this fact (which had not been apparent to me when I set aside the original decision), I directed that Ms Kelly must provide an explanation and, in particular, must confirm whether (and, if so, when) she actually received the email.
 12. Ms Kelly responded via her solicitor on 1 August to the effect that she had supplied an incorrect email address on her tribunal application form.
 13. On 13 September 2016, GN made a further application for a costs order against Ms Kelly.

The costs application

14. The Tribunal's powers to make orders for costs are governed by rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (“the Tribunal Rules”). The general principle (set out in rule 13(1)(b)) is that the Tribunal may only make an order in respect of costs if a person has acted unreasonably in bringing, defending or conducting proceedings before the Tribunal. The application of rule 13 has recently been considered and explained by the Upper Tribunal (Lands Chamber) in the case of *Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 290 (LC). The correct application of the rule requires the Tribunal to adopt the following approach when determining an application for costs:
 1. Is there a reasonable explanation for the behaviour complained of?
 2. If not, then, as a matter of discretion, should an order for costs be made?
 3. If an order for costs should be made, what should be the terms of that order?

15. On behalf of GN, Mr Armstrong argued that there are a number of respects in which Ms Kelly has acted unreasonably in the conduct of these proceedings. First, he argued that it was unreasonable for her to supply an incorrect email address on the application form. Secondly, having supplied that incorrect address, Ms Kelly should have realised her mistake before applying for the strike out decision to be set aside. Thirdly, Mr Armstrong argued that it was unreasonable for Ms Kelly not to have provided the Tribunal and GN with a detailed explanation of relevant events in advance of the preliminary hearing. On this basis Mr Armstrong sought an order for GN's costs in the sum of £2,527 before VAT for work in connection with the first preliminary hearing, plus £850 (being part of the brief fee in respect of the second preliminary hearing).
16. It is unfortunate (to say the least) that Ms Kelly did not take more care when supplying her contact details, including her email address, on the tribunal application form. Rule 16 of the Tribunal Rules entitles the Tribunal (and the respondent) to deliver documents electronically to the email address supplied by an applicant in the absence of notification to the contrary. It is therefore important that any email address supplied is one which is operative and which the applicant is able to access easily.
17. When (on 1 August 2016) Ms Kelly responded to my request for clarification of the apparent confusion as to whether she had received the email sent to her by the case officer on 29 January, she said:

“I have looked at the original application I made to the tribunal and the email I used was a personal email that I had not used for some time and had no log in details for. I'm not sure why I did that only to say that I did make the application in sheer panic after visiting the rent tribunal offices in London for some free advice and being advised to get an application in to the rent tribunal asap. I got the email from my mobile phone.”
18. Ms Kelly went on to say that, thinking it unusual that she had heard nothing from the Tribunal following submission of the application, she had sought advice from Ms Evans at Weightmans in February 2016, and had only then telephoned the tribunal administration to enquire about the application's status. Ms Kelly says that, upon doing so, she was asked to confirm her email address “... and it was then that we realised an error had been made. At this point I thought the mistake had been made by [the case officer] and not me”.

19. This explanation was expanded upon when Ms Kelly gave oral evidence at the second preliminary hearing. Ms Kelly said that the email address she had supplied on the application form was a valid email address but related to an email account which had not been her current personal email account at that time. When completing the form, Ms Kelly had copied the email address from her mobile phone, to which the email account in question had still been linked. Although the email account was still operative, Ms Kelly no longer had the password for it. Nevertheless, with her daughter's assistance, Ms Kelly has recently been able to access the account and she confirmed that the email sent on 29 January was visible in her inbox.
20. I do not consider that Ms Kelly's initial error necessarily amounts to unreasonable conduct. Nor do I think that the manner in which she has since explained relevant events is unreasonable. However, I do consider it unreasonable that neither Ms Kelly nor her solicitor did more to check the relevant facts before appearing at the first preliminary hearing and applying for the strike out decision to be set aside on the basis of error made solely by the tribunal administration. Had they done so, then it would have become apparent to all that Ms Kelly would not have seen the email in question even if no such error had been made. From the date of her initial telephone enquiry to the tribunal administration in February 2016, Ms Kelly was clearly on notice that there was a mis-match of some description between the contact information which she had supplied on the application form and that which the administration had used on 29 January. I accept that Ms Kelly never troubled to explore the details of that mis-match but, in my view, it was unreasonable for her not to have done so given that this formed the basis of her subsequent application to set aside.
21. For these reasons, I consider that the threshold for making a costs order under rule 13 has been crossed. However, it does not follow that such an order should necessarily be made. As is apparent from the *Willow Court* case, the Tribunal must go on to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not.
22. On the particular facts of the present case, I do not consider that Ms Kelly's unreasonable conduct justifies the making of a costs order in favour of GN. I have come to this conclusion because it appears to me that the costs which GN now seeks to recover were incurred without good reason. Ms Kelly should not be required to contribute to such costs, irrespective of the findings I have made concerning her conduct.

23. All of the costs in question (apart from the contribution to counsel's brief fee for the second preliminary hearing) were incurred by GN in opposing Ms Kelly's application to set aside my decision to strike out the proceedings (and in making a costs application associated therewith). However, I note that, in making the set aside application, Weightmans had sent an email to the Tribunal on 23 March 2016 in which they stated:

"Ms Kelly had not previously been aware of the change in Landlord and in those circumstances could you please treat this email as her application to substitute the current landlord Fresh Start Living (No 5) Limited as the Respondent in this application together with Bispham House Management Company Ltd as managing agent."

24. A copy of this email was sent to GN's solicitors the next day and, given its clear indication that Ms Kelly now realised that GN was not her landlord and should not be the respondent to her application, it is entirely unclear why GN nevertheless felt the need to oppose the set aside application. By the time of the first preliminary hearing in June, it had been ascertained that Ms Kelly's landlord is actually Acrophile (not Fresh Start Living (No 5) Limited). Moreover, the application to join the management company as an additional respondent was not pursued. But none of this had any obvious impact upon GN: it had been plain from 23 March onwards that Ms Kelly no longer desired to pursue her application against GN. In those circumstances, it seems to me that such representations as GN may have wished to make on the matter could (and should) have been made briefly, and in writing. There was no need for GN to oppose the set aside application or to instruct counsel to attend an oral hearing.
25. The grounds on which GN did, in fact, oppose the set aside application were, in essence, that: (1) the application had been brought against the incorrect respondent unreasonably; and (2) the application was doomed to failure in any event because the underlying dispute does not concern a service charge.
26. The first of these objections was, of course, dealt with by substitution of the landlord as respondent. As far as the second point is concerned, I have queried the relevance of this argument to GN's stated position as a third party on a number of occasions. For example, at paragraph 9 of my decision dated 23 February 2016 (the strike out decision) I said this:

"As far as the second objection raised by J B Leitch is concerned, and given their clients' position that the Lease has nothing to do with them, I am somewhat at a loss as to why they have felt the need to raise arguments about the legal status of any payments which may be due thereunder. It is unnecessary to consider such arguments."

27. Counsel representing GN at the first preliminary hearing (Ms Ackerley) accepted that her client did not have standing to press this point and I stated (at paragraph 10 of my decision dated 8 June 2016) that:

“I was unable to discern any reason why Ground Nominees Limited could have a legitimate interest in the question whether these proceedings should be permitted to continue against a third party, given Ms Kelly’s acceptance that Ground Nominees Limited is not the appropriate respondent in any event.”

28. I heard nothing during the second preliminary hearing which causes me to take a different view on this matter. I therefore refuse GN’s latest costs application.

The strike out application

29. In contrast to GN, Acrophile does have the necessary standing to challenge whether Ms Kelly’s application under section 27A of the Landlord and Tenant Act 1985 is appropriate in the circumstances of this case. I therefore heard detailed argument on the point during the second preliminary hearing.

30. The Tribunal’s jurisdiction to make a determination under section 27A is, of course, confined to specified matters concerning a “service charge” as that expression is defined in section 18(1). The subject of the Tribunal’s determination must therefore be:

“... 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.”

31. “Relevant costs” for this purpose 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 (section 18(2)).

32. The charge in respect of which Ms Kelly seeks a determination under section 27A is referred to in her lease of the Property as “the improvement contribution”. The parties agree that it is payable, directly or indirectly, for one or more of the things listed in section 18(1)(a). However, on behalf of Acrophile, Mr Armstrong argued that the improvement contribution is not a service charge because it is a fixed sum, and thus does not satisfy the requirement in section 18(1)(b).

33. Ms Evans argued the contrary view: she asserted that the amount which Ms Kelly contracted to pay by way of improvement contribution under the lease is a sum which must be ascertained by reference to the relevant costs incurred by the landlord. The amount of the contribution varies according to those costs and it therefore falls within the statutory definition of a service charge.
34. Ms Kelly holds the Property under a lease dated 8 July 2002 made between Liverpool Housing Action Trust (1) and Karen Kelly, Mark Anthony Foster and Elizabeth Kelly (2). The lease was granted for a term of 125 years from 1 March 2001 and reserved an annual rent of £10.
35. The lease was granted pursuant to the right to buy provisions of the Housing Act 1985. As a result, restrictions apply to the recovery of service charge contributions by the landlord: paragraph 16B of Schedule 6 to the Act has the effect of capping service charges in respect of repairs during the first five years of the lease by reference to estimates provided by the landlord prior to completion (in accordance with section 125). Paragraph 16C has a similar effect in respect of any "improvement contributions": the tenant is not required to make any payment in respect of works for which no estimate was given in the landlord's section 125 notice. In respect of works for which an estimate was given, the tenant's liability is capped at the amount of that estimate, plus an inflation allowance. For the purposes of this Act, "improvement contribution" means an amount payable by a tenant of a flat in respect of improvements to the flat, the building in which it is situated or any other building or land, other than works carried out in discharge of the landlord's statutory repairing and insuring obligations (section 187).
36. The relevant provisions of the lease are set out in the Annex to this decision. Mr Armstrong submits that the combined effect of these provisions is that clause 2(ii)(b)(3) obliges Ms Kelly to pay on demand a fixed sum of £32,838. He argues that this is the case irrespective of whether the actual cost of works in question is more (or less) than the total estimated cost stated in the seventh schedule to the lease and, indeed, irrespective of whether the works were carried out at all.
37. It is fairly clear that clause 2(ii)(b)(3) refers to an improvement contribution as defined by section 187 of the Housing Act 1985. Although the landlord's notice under section 125 of the Act has not been produced in these proceedings, it is also reasonable to infer that the figures set out in the seventh schedule to the lease are those which would have been provided in that notice (in accordance with section 125B(2) and (3)).

38. A tenant who acquires a lease pursuant to the right to buy provisions of the Housing Act 1985 should doubtless expect to have to pay an improvement contribution up to the amount specified in the landlord's section 125 notice. Indeed, this is one of the assumptions made when determining the value of the property under section 127. However, it is equally clear that the statute envisages that the actual amount of any such contribution will depend upon the costs actually incurred by the landlord in making the relevant improvements: by virtue of section 125B(3) of the 1985 Act, the pre-completion estimate which the landlord must give in respect of any improvement contribution must show the amount (at current prices) of the likely cost of each item of the relevant works, and of the tenant's likely contribution. It must also show the aggregate amounts of those estimated costs and contributions. The clear expectation is that, in the ordinary course of things, the tenant's actual contribution will need to be determined once the landlord's actual costs are known. The question for the Tribunal in the present case is whether Ms Kelly's lease confounds that expectation by providing for the improvement contribution to be a fixed sum.
39. The drafting of the lease is unclear and is unsatisfactory in several respects: the meaning of a number of its provisions is quite difficult to discern. Nevertheless, I consider that the effect of the provisions in question is consistent with the ordinary expectation in relation to improvement contributions, and that the amount (if any) payable by Ms Kelly under clause 2(ii)(b)(3) depends upon the amount of the costs incurred by the landlord in carrying out relevant improvement works. The following factors are relevant to my conclusion in this regard:
1. If the draftsman of the lease had intended to make provision for an unqualified obligation to pay a sum of £32,838 on demand, he or she could have done so in short and straightforward terms. The draftsman self-evidently did not do so, which suggests that the intended arrangement entailed more than that.
 2. Acrophile's argument requires a focus on the words "to pay ... the improvement contribution ... set out in the Seventh Schedule" coupled with the fact that the final column in the seventh schedule is headed "Tenants Contribution" with no reference to the word "estimated". However, it also requires one to disregard both the qualification to clause 2(ii)(b)(3), and also the reference at the outset of clause 2(ii) to clause 5(5). Both provisions make it clear that certain costs incurred by the landlord in connection with obligations under the Housing Act 1985 Act cannot form part of the improvement contribution. This would be meaningless if the tenant's obligation was to pay the sum of £32,838 come what may.

3. Acrophile's argument also requires the reference in sub-clause (b)(3) to "the reasonable part of the cost" to be disregarded, along with the explanation in sub-clause (b)(4) of what that means. It is plain that the amount which the tenant must pay under any of sub-clauses (b)(1) – (3) (including, therefore, the improvement contribution) is calculated by reference to the cost incurred by the landlord. The amounts specified in the seventh schedule must therefore be taken to be indicative only.
40. This construction also makes sense when clause 2(ii) of the lease is considered as a whole. The clause is divided into three principal components (sub-clauses (a) – (c)), all of which concern the tenant's obligations to contribute to the costs of various services. Sub-clause (c) has not previously been mentioned in this decision. However, it is significant because it incorporates the provisions of the fourth schedule to the lease, and those provisions are arguably the ones which set out the contractual machinery for a service charge in the most easily recognisable way. To begin with, the fourth schedule is headed "The Service Charge". It goes on to provide, in reasonably standard form, for the tenant to contribute one fifty-sixth part of certain expenditure in each year. The tenant is required to make contributions in advance, based on the landlord's estimates of expenditure to be incurred, and there is a year-end reconciliation mechanism which must be applied once details of actual expenditure are known. What makes these particular service charge provisions unusual, however, is that the list of the services to which the service charge applies (set out in paragraph 6 of the schedule) does not include a number of potentially major heads of expenditure: in particular, it does not include any of the costs of maintaining or repairing the main building (other than the common parts); of insuring; or of making improvements.
41. The reason for these omissions from paragraph 6 of the fourth schedule is obvious: it is because the tenant's obligations to contribute to such costs is dealt with elsewhere in the lease (in clauses 2(ii)(b)(1), (2) and (3) respectively). Mr Armstrong did not argue that any contributions which Ms Kelly is obliged to pay by virtue of sub-clauses (b)(1) and (2) (towards the costs of repairs and insurance) are anything other than "service charges" within the meaning of section 18(1) of the Landlord and Tenant Act 1985 – and I have no doubt that they are indeed service charges. In the same way, the fact that the improvement contribution is dealt with in sub-clause (b)(3) rather than in the fourth schedule does not prevent it from being a service charge. Indeed, it is noteworthy that the draftsman applied a marginal note to each clause in the lease, and that the marginal note for the entirety of clause 2(ii) is "Service Charge". Again, whilst the application of a mere label can have no effect on the classification of a particular charge as a question of law, it is nevertheless indicative of the draftsman's understanding of the arrangement to be established by the lease.

42. For these reasons, I conclude that the Tribunal does have jurisdiction under section 27A of the Landlord and Tenant Act 1985 to make a determination in respect of the improvement contribution provided for in the lease. Acrophile's application for the proceedings to be struck out is accordingly refused.

Next steps

43. On 8 June 2016 the Tribunal issued directions for the conduct of these proceedings. Compliance with those directions was subsequently suspended pending determination of Acrophile's strike out application. Compliance with the directions should therefore now resume. However, given the close proximity of the festive season, it is appropriate to allow the Respondent an extended period of 28 days to comply with the initial disclosure requirements.

ANNEX

Relevant Provisions of the Lease

2. The Tenant for himself and his successors in title HEREBY COVENANTS with the Landlord as follows:
 - (i) ...
 - (ii) Subject to clause 5(5) hereof to pay on demand:
 - (a) ...
 - (b)
 - (1) [a reasonable part of the cost of repairs]
 - (2) [a reasonable part of the cost of insurance]
 - (3) the improvement contribution being the reasonable part of the cost to the Landlord in respect of improvements to the demised premises the main building and any other building or land set out in the Seventh Schedule hereto other than works carried out in discharge of any such obligations by the Landlord to the Tenant referred to in paragraph 16A(1) of Schedule 6 to the [Housing Act 1985] but subject to the restrictions on the costs of the said improvements set out in paragraphs 16C(2) (3) and (4) and 16D of Schedule 6 aforesaid
 - (4) such reasonable parts referred to in paragraphs (1) (2) and (3) of this sub-clause to be the whole cost and expenses incurred by the Landlord ... divided by 56 (being the number of flats in the main building)
 - (c) The Initial Charge and the Service Charge at the times and in the manner provided in the Fourth Schedule hereto.

The Seventh Schedule
(Improvement Works)

	Estimate of Costs (£)	Tenants Contribution (£)
1. Substructures etc	541,352.00	9,667.00
2. Internal walls/doors Floors/ceilings finishes	67,872.00	1,212.00
3. External doors	19,096.00	341.00
4. Fittings	187,992.00	3,357.00
5. Mechanical/Electrical and Water services	192,136.00	3,341.00
6. Site Works etc	433,272.00	7,737.00
SUB-TOTAL	1,441,720.00	25,745.00
INFLATION OVER 6 YEARS	397,208.00	7,093.00
TOTAL	1,838,928	32,838.00