



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

Case Reference : CHI/OOMR/LAC/2017/0005

Property : Flat 40, St Mary`s House, St Mary`s Road,
Portsmouth PO3 6AB

Applicants : Jonathan Hutchings & Diane Hutchings

Representative : ---

Respondents : First Wessex

Representative : Capsticks LLP

Type of Applications: Applications for (1) determination as to liability to pay an administration charge pursuant to Schedule 11 Commonhold and Leasehold Reform Act 2002 and (2) an order under Section 20C Landlord and Tenant Act 1985

Tribunal Members : Judge P.J. Barber

Date of Decision: 30th May
2017

DECISION

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Decision

- (1) The Tribunal determines in accordance with the provisions of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"), that the administration charges are not payable under clause 3(9) of the Lease, in relation to previous proceedings under number CHI/00MR/LSC/2015/0051 & 0043.
- (2) In regard to Section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act") The Tribunal determines that none of the costs incurred or to be incurred by the Respondent landlord in connection with these proceedings are to be regarded as relevant costs to be taken into account in determining the amount of any service charges payable by the Applicants.
- (3) The Tribunal makes no order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 regarding any Reimbursement of application fees.

Reasons

INTRODUCTION

1. The applications in this matter are firstly, dated 19th February 2017 in relation to Schedule 11 to the 2002 Act for determination of administration charges payable by the Applicants to the Respondent and secondly, dated 21st March 2017, for an order under Section 20C of the 1985 Act in relation to the Respondent landlord`s costs. Directions were issued in the matter on 14th March 2017, indicating that the matter shall be dealt with on the papers unless a party objects. The Applicants had indicated in the second application that they would be content with a paper determination. Neither party has expressed any objection to the matter being determined on the papers and without an oral hearing.
2. The directions identified the issues to be determined as including whether the Respondent`s legal costs in Tribunal Proceedings CHI/00MR/LSC/2015/0051 & 0043 are recoverable under the lease; whether the charge is reasonable and whether an order for re-imbusement of application fees should be made.

INSPECTION

3. No inspection of the Property was carried out by the Tribunal in regard to these applications.

THE LAW

4. Paragraphs 2 and 5 of Schedule 11 of the 2002 Act provide that :

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

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).....

5. Section 20C of the 1985 Act provides as follows:-

"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...or the First-tier 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)

(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.*

THE WRITTEN REPRESENTATIONS

6. The bundle of documents provided to the Tribunal included a copy of the Lease dated 28th March 1991 made between Southlands Housing Association Limited (1) David Michael Kearney (2) in relation to Flat 40, St Mary`s House, Portsmouth ("the Lease").
7. The bundle further included a copy of the applications; the Applicants indicated in the Schedule 11 application that the Respondent landlord was seeking to recover legal costs from previous Tribunal Proceedings under number CHI/00MR/LSC/2015/0051 & 0054; the Applicants submitted in broad terms that clause 3(9) of the Lease does not entitle the Respondent to recover legal costs via an administration charge, adding that the decision of the Tribunal in the earlier proceedings had been that the Respondent could only recover 50% of their legal costs through service charges. The Applicants referred also to a letter dated 13th January 2017 received from the Respondent which they said was accompanied by a brief invoice with little explanatory information. The Applicants understood the intention of First Wessex was not to recharge tenants, in relation to the costs arising from First Wessex`s application, but nevertheless to make a charge in respect of defending the tenants` counter-application in relation to the previous proceedings. The Applicants submitted that the cross application had been dealt with in only one hour, out of a two day hearing and that a charge of approximately £30,000 in this regard was totally disproportionate. The Applicants also referred to an N260 statement of costs received from the Respondent dated 3rd August 2016, but which they had not previously seen. The Applicants also submitted that the amount being recharged was only £10,000 less than the Respondent`s entire legal costs, and complained

as to a lack of clarity and transparency in the process, adding that the Respondent is attempting to by-pass the determination as to costs in the earlier proceedings. The Applicants further submitted that clause 3(9) in the Lease does not allow recovery of such costs, since they do not relate to a notice under either Sections 146 or 147 of the Law of Property Act 1925.

8. In a statement of case dated 18th April 2017, the Respondent submitted in broad terms that there can be no argument that it had won the previous application and pointed out that the tenants' cross application had been struck out in relation to years prior to 2012/13, and in respect of the years thereafter, determined in favour of First Wessex. The Respondent further submitted that it is entitled to recover costs under clause 3(9) in the Lease, referring to the decision in *Freeholders of 69 Marina v Oram and Ghoorun [2011] EWCA Civ 1258* which the Respondent suggested involved consideration of a not wholly dissimilar costs covenant. The Respondent referred to the judgment of Sir Andrew Morritt "*In short the enforcement of the liability of the tenants under clause 1(b) required first the determination of the Tribunal and second a s.146 notice*". The Respondent also submitted that clause 3(9) in the Lease went further than the covenant in the *Freeholders of 69* decision, by including the words "*or otherwise incurred by the Landlord in respect of any breach of covenant by the Leaseholder hereunder*". In regard to reasonableness of the costs, the Respondent appended a detailed breakdown of the costs in a grand total of £43,728.80 including VAT, saying it had endeavoured to deduct from this figure an allowance for costs relating to defending the tenants' cross application, suggesting it had taken a favourable broad brush approach, resulting in costs of £30,950.48 for dealing with it and referring to an extremely generous discount of £9,702.76 excluding VAT. In regard to the effect of the order made in the earlier proceedings, the Respondent referred to the decision in *87 St George's Square Management Ltd v Whiteside [2016] UKUT 438 (LC)*, adding that the order was made only in relation to Section 20C of the 1985 Act and did not affect the Respondent's separate ability to recover its costs for pursuing a breach of covenant under a direct contractual entitlement and covenant. The Respondent appended a copy of the letter to tenants dated 13th January 2017 which it admitted was written in unfortunate terms and may have caused some confusion and as a result the Respondent confirmed that it does not oppose the Section 20C application in this matter.
9. In a response dated 30th April 2017, to the Respondent's statement of case, the Applicants broadly submitted that they denied refusing to pay the cost of the major works, but felt that First Wessex had negligently maintained the building and the sinking fund, resulting in large demands arising for each resident in July 2015, and also resulting in the tenants invoking support from their MP and the local press. The Applicants further submitted that although the cross-application in relation to the service charge years before 2012/13 had been struck out, First Wessex had only made application for such strike out, less than a month before the substantive hearing, and had they done so sooner, they could have avoided some of the costs. In addition the Applicants referred to the earlier decision in relation to the proceedings in June 2016, in which the Tribunal had considered that only 50% of the costs incurred by First Wessex in connection with these proceedings are to be regarded as relevant costs, and submitted that rather than charging 50% of legal costs to all 60 lessees, First Wessex was invoicing only the

21 tenants who had participated in the proceedings, and charging them 75% of their legal costs. The Applicants further submitted that there is no evidence that First Wessex ever intended to issue a notice of intended forfeiture to tenants under Section 146 Law of Property Act 1925. The Applicants disputed the relevance of the decision in *Freeholders of 69 Marina*, saying that in that case the lessees had refused to pay the cost of the works for a considerable time, unlike in the present case. In regard to the cost of the major works, the Applicants said that they had taken up the Respondent`s offer to all lessees to pay the amount over a period of 5 years and that they have been paying in accordance with such offered arrangement since the earlier decision. The Applicants repeated their earlier concern about having been provided with little detail regarding the Respondent`s claimed legal charges, until making the application. The Applicants also questioned the relevance of some of the invoices issued by Capsticks, including Invoice number 266073 relating to replies to enquiries in respect of a sale of No. 59 and Invoice number 277795 to replies and general enquiries when dealing with re-sales and other matters. The Applicants further submitted that First Wessex`s original application had involved all 60 lessees, and had the lessees been successful in the proceedings, all 60 would have benefited. The Applicants further questioned the discrepancy between the legal costs of £43,728.80 as at August 2016 and £39,543.70 as at January 2017. The Applicants said the Respondent had admitted that the majority of the time expended in dealing with the application was incurred with the major works costs; accordingly the Applicants questioned why 75% of the legal costs were being claimed against only the 21 lessees, involved in the cross application; the Applicants further questioned how First Wessex could claim that that had taken a favourable broad brush approach in reducing legal costs to £30,950.48, to allow for time spent in dealing with the cross application, and disputed whether this was an "extremely generous discount" as suggested by First Wessex, without information or justification as to how the figure is arrived at. The Applicants disputed that they had been in breach of covenant and/or that First Wessex were pursuing Section 146 of the Law of Property Act 1925, referring generally to the supply of incorrect or misleading information.

CONSIDERATION

10. The Tribunal have taken into account all the written submissions as well as the case papers provided by the parties and contained in the bundle.
11. The Tribunal notes the concerns of the Applicants as to incorrect information and finds such concerns to be to an extent justified, for example by reference to the mathematical error made by the Respondent in adding its own figures together in paragraph 19 of the Respondent`s statement dated 18th April 2017, and also the inclusion of invoices in the bundle relating at least in part, to other matters.
12. The Tribunal further notes from the Respondent`s statement that the charges listed in paragraph 19 represent the whole costs of the Respondent in the previous proceedings, but discounted to a total of £30,950.48 as at paragraph 21, to exclude the costs relating to defending the cross-proceedings. The Respondent claims the sum of £30,950.48, not pursuant to the determination of the Tribunal in regard to Section 20C in the previous proceedings, but directly from the lessees under clause 3(9) in the Lease for pursuing a breach of covenant, as referred to in paragraph 25 of the Respondent`s statement.

13. However, whilst the Respondent alleges at paragraph 23 that it has reduced costs by way of an "extremely generous discount", so as to exclude work undertaken in dealing with the cross-application, no clear rationale or explanation is offered as to the basis or calculation of such discount.
14. In pursuing the costs in question directly under clause 3(9) in the leases, the Respondent alleges that they arose "...for the purposes of or incidental to the preparation and service of a Notice under S.146 Law of Property Act 1946 notwithstanding forfeiture may be otherwise avoided...or otherwise incurred by the Landlord in respect of any breach of covenant by the Leaseholder hereunder". However, by its own admission, the costs in question relate to the earlier proceedings brought by First Wessex for determination by the Tribunal of reasonableness of service charges. Whilst the Respondent suggests that actions for determination of reasonableness and a Section 146 notice are cumulative, it does not necessarily follow that proceedings under Section 27A for determination of reasonableness of service charges, such as were brought by First Wessex, are either for the purposes of or incidental to the preparation and service of a Section 146 notice, or otherwise incurred in respect of any breach of covenant.
15. In *Freeholders of 69 Marina*, the landlord had also made application to the county court for non-payment of service charges whilst in this case, as the Applicants point out, they have been making payments in respect of the major works costs by instalments in accordance with the offer to that effect made by First Wessex during the course of the original proceedings. Accordingly, the decision in *Freeholders of 69 Marina* is distinguishable from the present case.
16. The decision in *87 St George`s Square* was indeed to the effect that costs may in principle be claimed not only pursuant to an order under Rule 13, but also by means of a relevant contractual provision in the leases. Again, the facts in *87 St George`s Square* are distinguishable on the basis that in that case, in addition to an application under Section 27A, the landlord also made an application under Section 168 Commonhold and Leasehold Reform Act 2002, for a determination as to a breach of covenant in regard to the tenant`s failure to pay the cost of the works concerned.
17. In the present case, the application by First Wessex was under Section 27A of the 1985 for a determination as to reasonableness of service charges. There is no clear or persuasive evidence provided to the effect that the costs claimed were either for the purposes of or incidental to issue of a Section 146 notice, or incurred in respect of any breach of covenant. Indeed, the purpose of the application was to seek a determination regarding whether or not the service charges were reasonable and payable, and until a determination was made, the tenants could not be considered to have been in breach of covenant. Given that the Applicants have commenced payments on an instalment basis, towards the costs of the major works, in accordance with the offer made to them by First Wessex during the course of those earlier proceedings, the Applicants cannot be said to be in breach of covenant for non-payment. There is no clear or unequivocal evidence to the effect that First Wessex`s purpose in bringing the earlier Section 27A proceedings was to serve, or be incidental by way of facilitating service of, a Section 146 notice. Similarly the bringing and substantive prosecution of the Section 27A proceedings cannot in themselves be regarded as being proceedings in respect of a breach of covenant.

18. Accordingly on the facts in the present case and the evidence as presented, the Tribunal determines that the Respondent is not entitled to its costs in the earlier proceedings, in reliance upon clause 3(9) in the lease.
19. In regard to the application for an order under Section 20C of the 1985 Act, the Tribunal notes that such application is not opposed by the Respondent and in the circumstances the Tribunal determines that none of the Respondent landlord's costs in connection with these proceedings are to be regarded as relevant costs to be taken into account in determining service charges payable by the Applicants.
20. The directions in this matter referred to possible reimbursement of application fees; however as none were paid in this matter, the Tribunal makes no order in that regard pursuant to Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.
21. We made our decisions accordingly.

Judge P J Barber

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.