

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

**DECISION OF THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION
UNDER SECTION 27A OF THE LANDLORD AND TENANT ACT 1985**

FLAT 25, 25-30 SUNDERLAND CLOSE, ROCHESTER, KENT ME1 3AS

Applicant: Shuttleworth Property Co Ltd (Freeholder)

Respondent: Ms Claire Richards (Lessee)

Dates of hearing: 11 October 2007

Appearances: Mr M Paine FPCS of Circle Residential Management Ltd, for the
applicant

The respondent did not attend

Members of the Leasehold Valuation Tribunal:

Mr MA Loveday BA(Hons) MCI Arb

Mr C White FRICS

Ms L Farrier

BACKGROUND

1. This matter started as an application by the landlord for a determination of liability to pay service charges under section 27A of the Landlord and Tenant Act 1985 ("LTA 1985"). The respondent lessee conceded that the relevant costs were recoverable on 4 October 2007, a week before the hearing. The applicant has made two further applications:
 - (a) An application for reimbursement of fees under Regulation 9 of the Leasehold Valuation Tribunals (Fees) Regulations 2003.
 - (b) An application for costs under paragraph 10(2) of schedule 12 to the Commonhold and Leasehold Reform Act 2002.

FACTS

2. The applicant is freehold owner of a block of flats at 25-30 Sunderland Close, Rochester. The respondent is lessee of a ground floor flat under a lease dated 29 April 1988. The applicant issued a County Court claim 15 August 2006 in respect of interim service charges due on 29 September 2005 and administrative charges. The court transferred the matter to the Leasehold Valuation Tribunal and on 27 April 2007 a differently constituted Tribunal found that the respondent was liable for the service charges (the claim for administrative charges was not pursued). The applicant also issued another County Court claim for service charges and administrative charges due on 24 June 2006 for the 2005/06 service charge year. Judgment in default was given on 27 October 2006 (it appears that an application may have been made for this to be set aside, but that the application was unsuccessful). On 11 May 2007, Mr Paine wrote to the respondent with details of the 2006/07 interim charges and stated that if the respondent did not agree to the charges in writing, he would issue a claim to the LVT under section 27A. On 17 May the respondent asked for time to reply to be extended to 24 May, which Mr Paine agreed to. The written acknowledgement was not forthcoming and the present application was therefore issued on 24 May 2007. The sum claimed is £700. Directions were given on 29 June 2007 and the matter was set down for hearing on 11 October 2007. On 18 August, Mr Paine wrote to the respondent asking her to agree the sums claimed in writing within 28 days and

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suggesting that an LVT hearing would not then be necessary. No response was received, so the applicant paid the hearing fee of £150 on 18 September 2007. On 30 September 2007, the respondent emailed Mr Paine stating that *"I need you to understand that the charges now that the work in the main (sic) are not unreasonable and I want to pay them."* She went on to say that she was going to send the charges which she agreed to pay for this quarter and then she hoped they could agree on a settlement for the rest. On 1 October, Mr Paine replied asking which property the email related to. On the same day the respondent emailed back confirming her address and postcode and stating that she agreed the quarter in question until September 2007, but not the costs. There was then a further exchange of emails on 4 October when the respondent stated in relation to the £700 interim charge for 2006/07 that *"in answer to your question I have never disputed those charges just the enormous costs you added..."* Mr Paine prepared written submissions for the hearing which he faxed on 6 October 2007 (there was a postal strike on that day).

ADJOURNMENT

3. On the morning of the hearing, members of the Tribunal attended for an inspection of the property but were unable to gain access. The respondent (who was in the flat) submitted a letter to the Tribunal at the start of the hearing, seeking an adjournment on the ground that she had been unaware of the hearing date. She confirmed that she had received the applicant's submissions of 6 October 2007. Mr Paine opposed the application.
4. The Tribunal refused to adjourn the hearing for the following reasons. First, it was satisfied that the respondent had had notice of the hearing. There was the email from the respondent dated 1 October 2007 confirming her address and postcode. This was in response to a letter from Mr Paine dated 18 August 2007 which plainly referred to the LVT application. The email of 6 October included a covering letter which made two separate references to a hearing taking place on 11 October and one reference to the start time. The Tribunal also gave notice of the hearing which was sent to the address given by the respondent in her email. Secondly, the Tribunal considered that there would a considerable saving in time and costs not to adjourn (both for the Tribunal

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and for the parties). Thirdly, although the respondent would suffer prejudice by not attending, the applications which remained could fairly be dealt with on the correspondence produced. Finally, the Tribunal noted that the respondent had made no submissions and had not complied with any of the directions already given. Her involvement in this application had been negligible.

REIMBURSEMENT OF FEES

5. Mr Paine sought reimbursement of the application fee of £70 and the hearing fee of £150 (letter 18 September 2007). He referred to a recent determination of another Tribunal in respect of *Flat 1, 6 Walmer Castle Road, Deal* CHI/29UE/LCS/2007/0050 (where Mr Paine appeared for the landlord). Fees were reimbursed after the lessee failed to reply to correspondence. He submitted that the Tribunal's jurisdiction was wide and it was not limited to situations where the other side had acted frivolously or vexatiously. One could take other conduct into account. He relied on the letter of 11 May 2007 (to which the respondent had not responded), the extension of time and a further email on 17 May (which was not before the Tribunal) inviting the respondent to agree the charges. He had therefore had to issue the application. Thereafter, he relied on the respondent's failure to deal with the application or the directions and the letter of 18 August (to which there was again no immediate response). As a result, he had had to pay the hearing fee. The recent exchange of emails stated that the respondent had never disputed the charges – although the respondent had not stated this until after the fees had been paid. These were not the actions of a reasonable party to a dispute before the Tribunal. The Tribunal put to Mr Paine that the respondent could be said to be simply requiring the applicant to go through a procedure provided for by Parliament. Mr Paine stated that in effect this was an abuse of process in that the respondent was using the section 27A procedure to delay payment of charges which were admitted.

6. Regulation 9 of the Leasehold Valuation Tribunals (Fees) Regulations 2003 is as follows:

Reimbursement of fees
9 -(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee

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is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

There is no guidance from the courts or from the Lands Tribunal on the provision. The Tribunal accepts that its discretion is a wide one. The words can be contrasted with the words of paragraph 10(2) of schedule 12 to the Commonhold and Leasehold Reform Act 2002 (which plainly fetter the Tribunal's discretion) and the express qualification that the Tribunal must find it "*just and equitable*" to make an award under section 20C(3) of the 1985 Act. The Tribunal may therefore consider both the conduct of the applicant and the conduct of the respondent falling short of actions which are "*frivolous*", "*vexatious*" or otherwise an "*abuse*" of process. Nevertheless, the Tribunal bears in mind the general presumption that a party before the Tribunal "*shall not be required to pay costs incurred by another person in connection with proceedings*": see paragraph 10(4) of schedule 12 to the 2002 Act. Given the wide discretion, previous determinations of other Tribunals (particularly where the reasoning is short) are of limited assistance.

7. The Tribunal requires the respondent to reimburse the applicant the application and hearing fees paid in respect of the proceedings. It takes into account the previous history of court and Tribunal hearings in respect of other service charges which show that the respondent has a history of non-payment of charges. The applicant has acted reasonably in writing before the application was issued and in granting an extension of time to respond. The respondent failed to reply to the letters and emails and the concession made was very late indeed. The applicant therefore had little choice but to incur the application and hearing fees.

COSTS

8. Mr Paine sought £500 in costs under paragraph 10(2) of Schedule 12 to the 2002 Act (submission 6 October 2007). He relied on the same essential facts as above in support of his claim for costs. Mr Paine accepted that the respondent had not acted "*frivolously, vexatiously, abusively or disruptively*"; indeed, his real complaint was that she had done nothing. Mr Paine contended instead that the respondent had been

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trying to frustrate the applicant and had therefore acted “unreasonably” under paragraph 10(2)(b). There had been invitations to settle the application which had been ignored. The applicant was forced to instruct Mr Paine to attend the Tribunal hearing not only to deal with the costs and fees matters, but also because there was a risk the respondent would have attended. The £500 was for preparation for the hearing – although the actual costs incurred by the applicant were many times that. Mr Paine’s charge out rate was £195 per hour plus VAT and he estimated his costs of the hearing alone amounted to some £2,000 plus VAT.

9. Paragraph 10 of Schedule 12 to the 2002 Act is as follows:

Costs

10. A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where—

(a) ...

(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

10. It has been said (in relation to similar costs provisions which apply to employment tribunals) that that “*this is a jurisdiction where an order for costs is very much the exception rather than the rule*” and that “*Parliament had set a high threshold for a costs order to be made*” per Scott Baker LJ in *Gee v Shell* [2003] IRLR 82. As stated above, the applicant does not seek to argue that the respondent has acted “*frivolously, vexatiously, abusively, disruptively*”. However, the Tribunal’s remaining jurisdiction to allow costs where the respondent has acted “*otherwise unreasonably*” is limited to a consideration of conduct “*in connection with the proceedings.*” For the purposes of costs, the Tribunal therefore ignores the previous history of proceedings in the courts and Tribunals and indeed the pre-application correspondence. However, the Tribunal does find that the respondent acted unreasonably in a way which is analogous to the other heads of misconduct set out in paragraph 10(2)(b). Here, the applicant took the precaution of writing letters at every stage inviting the respondent

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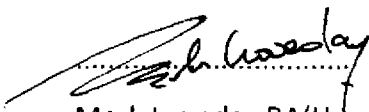
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to concede. Her emails of 1 and 4 October 2007 make it clear that the respondent did not intend to defend the claim at any stage of the application. In those circumstances, it was incumbent on her to inform the applicant and the Tribunal at the earliest opportunity and her failure to do so despite specific invitations from the applicant is in the Tribunal's view acting "*unreasonably*" in connection with the proceedings.

11. The amount sought by the applicant is a fair one. £500 does not reimburse the applicant its costs. Had the respondent conceded at the start, such a cost would not have been incurred by the landlord.

DETERMINATION

12. The respondent has conceded liability to pay interim charges of £700 in the 2006/07 service charge year.
13. Under regulation 9 of the Leasehold Valuation Tribunals (Fees) Regulations 2003, the Tribunal orders that the respondent should reimburse the applicant's application fee of £70 and the hearing fee of £150.
14. Under paragraph 10(2)(b) of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 the Tribunal determines that the respondent shall pay the costs incurred by the applicant in connection with the proceedings in the sum of £500.



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Chairman

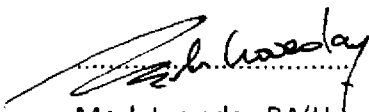
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