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H.M. COURTS & TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL

**Sections 27A and 20C of the Landlord and Tenant Act 1985 (as amended)
("the Act")**

Case Number:	CHI/21UG/LSC/2012/0001
Property:	Flats 1,2,5, & 6 Colben Court, 17 Rafati Way, Bexhill-on-Sea, East Sussex TN40 2EX
Applicant:	Colben Court Residents Limited
Respondents:	Mrs Katharine Kennedy Redmile Gordon (k/a Mrs Kennedy)
Appearances for Applicant:	Mr H Rafati, Director
Appearances for Respondent:	Respondent in person
Date of hearing	3 May 2012
Tribunal:	Ms E Morrison LLB JD (Lawyer Chairman) Mr R Norman (Lawyer Member)
Date of the Tribunal's Decision:	23 May 2012

The Applications

1. The Applicant management company applied under section 27A of the Act for a determination of the liability of the Respondent leaseholder (who is content to be known as Mrs Kennedy) to pay legal fees and expenses incurred in service charge years 2008 -2011.

2. The Tribunal also had before it an application under section 20C of the Act that the Applicant's costs of these proceedings should not be included in costs recoverable through future service charges.

Summary of Decision

3. No determination is made under section 27A of the Act that the Respondent is liable to pay legal fees and expenses beyond those dealt with by previous Tribunal decisions.
4. No order is made under section 20C of the Act. Nor is any order made that the Respondent should reimburse to the Applicant the fee paid in respect of these proceedings.

The Property

5. The Tribunal did not carry out an inspection as information was already available as to the nature of the property, and its present condition was not material to this application. Colben Court is a two-storey development of 8 flats built in about 2005, situated in a residential area of Bexhill. The block is constructed of brick with cement-rendered panels under a pitched tile-covered roof. There are two common access hallways and stairs, each serving 4 flats. Mrs Kennedy owns 4 of the flats, all reached through the same access hallway and all are let out. Mrs Kennedy does not live at the property.

The Lease

6. The Tribunal was provided with a copy of the lease of Flat 5 dated 30th September 2005. The lease is for a term of 125 years at a yearly rent of £75 until 2030 and rising thereafter. The lease is between (1) the landlord/freeholder HRB Construction Ltd, (2) the Applicant, described therein as the Management Company, and (3) the Respondent Tenant.
7. So far as material to the issues in this case the relevant provisions in the lease may be summarised as follows:
 - (a) Schedule 7 sets out the tenant's covenants. Under paragraph 7.6 Mrs Kennedy is liable to pay to the Management Company a service charge covering the costs (referred to in the lease as the Maintenance Expenses or the Building Costs) set out in the Fifth Schedule.
 - (b) Under Schedule 6 paragraph 6.1 Mrs Kennedy's proportion of the costs is 12.5% per flat.
 - (c) There is provision for the Mrs Kennedy to pay, twice-yearly, an estimated amount on account of the service charge.
 - (d) The Management Company is to prepare and serve on Mrs Kennedy an end-of year service charge final account (distinguishing between actual expenditure and any reserve for future expenditure) accompanied by an accountant's certificate.
 - (e) Within 21 days of this being done either Mrs Kennedy is to pay any balance due or the Management Company is to credit her for any excess paid on account.

- (f) The Maintenance Expenses include, under paragraph 5.12 of the Schedule 5, the cost of 'Generally managing and administering the Building and protecting the amenities of the Building and for that purpose of [s/c] employing a firm of managing agents and (in so far as the Landlord thinks fit) enforcing or attempting to enforce the observance of the covenants on the part of any of the Tenants'.
- (g) Under paragraph 7.2. of Schedule 7 Mrs Kennedy covenants 'To pay all costs charges and expenses (including legal costs and disbursements and fees payable to a surveyor) incurred by the Landlord in or in contemplation of any proceedings for the recovery of any sum or sums due under the provisions of this Lease from the Tenant or in connection with the service of any notice under Sections 146 and 147 of The Law of Property Act 1925 ...'

The Law

- 8. The tribunal has power under section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when a service charge is payable. However, no application may be made in respect of a matter which has been admitted or agreed by a tenant.
- 9. Under section 20C a tenant may apply for an order that all or any of the costs incurred in connection with proceedings before a leasehold valuation tribunal 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.

Representation at the Hearing

- 10. The Applicant was represented by Mr Rafati, a director of the company. Mr Rafati is also associated with the freeholder-developer and is a leaseholder of 2 flats. He lives at another property in the same road, Rafati Way.
- 11. Mrs Kennedy appeared in person.

Background to this Application

- 12. This is the fifth application before the Tribunal between these parties. Three previous applications have been made by the Respondent, and one by the Applicant. The third and fourth applications, resulting in Tribunal decisions dated 18 October 2010 and 29 November 2011 respectively, are directly relevant to the present case. The first addressed actual service charges for 2008 and 2009 and the budget for 2010. The second was concerned with actual service charges for 2010 and the budget for 2011.
- 13. In its decision of 18 October 2010 the Tribunal determined that the 2008 service charge could include the sum of £2058 for legal fees, being 75% of £2744 claimed. The figure of £2744 consisted of most (but not all) of the fees of Lawson Lewis & Co solicitors incurred by the management company in connection with its dispute(s) with Mrs Kennedy. Lawson Lewis's invoices were in the sum of £2157.01 dated 19 June 2008 and £823.11 dated 6 July 2009. (It is unclear why costs under the 2009 invoice

were included in the 2008 accounts but this does not affect the overall position).The remaining legal fees invoiced by Lawson Lewis were specifically disallowed.

14. A further sum of £1638.01 described in the service charge accounts for 2009 as 'Professional fees' was disallowed as no evidence was supplied to the Tribunal in support of this expense.
15. Mr Rafati requested but was refused permission to appeal from this decision.
16. In its decision of 29 November 2011, the Tribunal recorded that the parties had reached agreement as to the service charges for 2010 and the on-account (budget) service charges for 2011. The charges and budget figures agreed by Mrs Kennedy contained no mention of legal costs or expenses. In 2010 the service charge included £350 for 'professional fees', and in the 2011 budget the sum of £375 was allowed under this heading.
17. In both decisions the Tribunal noted the breakdown of the relationship between the parties and made some concluding remarks which it was hoped would assist the parties in resolving their differences, including those outside the remit of the Tribunal.
18. This application is dated 16 December 2011, just days after the parties would have received the Tribunal's decision of 29 November 2011. Directions were given on 5 January 2012. These noted that insofar as the application related to service charge years 2008 and 2009 it appeared that the matters raised were *res judicata*. Unless the Applicant could satisfy the Tribunal otherwise by written submissions the Tribunal would proceed to deal with the application with regard to years 2010 and 2011 only. Furthermore the Tribunal proposed to deal with the application on the paper track without a hearing unless either party objected.
19. Mr Rafati then filed written submissions disputing the matters raised were *res judicata* and requesting a hearing. Both parties filed statements of case. Without making any further ruling on the *res judicata* issue, the Tribunal listed the case for hearing.

Service charge years 2008 and 2009

The Applicant's case

20. Mr Rafati commenced by stating that he was making this application on behalf of the leaseholders other than Mrs Kennedy, namely himself, Mr Case and Mrs Mansbridge. When it was pointed out to him that the application was actually made by the management company, a legal entity entirely separate from the individual leaseholders, he had some difficulty understanding the distinction.
21. He explained that there had been a breakdown of the relationship between Mrs Kennedy and the other residents, including himself, with disputes over a number of issues. Due to what he described as breaches of covenants by Mrs Kennedy's tenants and her non-payment of service charges, solicitors were employed. Letters were written by the solicitors and there was a round-table meeting. Mr Rafati asserted that much of what Mrs Kennedy was unhappy about had nothing to do with the service charges. He complained that Mrs Kennedy was abusing the system and using the Tribunal to cause him problems. Mrs Kennedy agreed charges and then didn't pay them so the only option was to pay solicitors. He referred to an ongoing dispute with Mrs Kennedy relating to an insurance claim. Mrs Kennedy was seeking to set-off monies she said were due to her on the insurance claim against her service charge liability. However Mr Rafati disputed any monies were due to her as the insurance claim had not been successful.

22. He disagreed with the previous Tribunal decision disallowing £1638.01 professional fees. However he was still unable to tell that Tribunal what this charge related to. He had no supporting invoices.
23. Mr Rafati said he was asking this Tribunal to decide who was responsible for payment of the fee-notes of Lawson Lewis & Co and the sum of £1638.01. He argued that these costs should all be paid 'by the person causing the problem', namely Mrs Kennedy. He relied on Schedule 7 paragraph 7.2 of the Lease. He was also asking the Tribunal to decide who should pay these costs if they were disallowed as part of the service charge.

The Respondent's case

24. Mrs Kennedy said that she and her tenants had been harassed by Mr Rafati's complaints. She had been excluded from involvement in the management company and a meeting had been convened to get rid of her as a director. Some of the legal costs related to her dispute with Mr Rafati in his capacity as developer of the site. The Tribunal had already ruled on what sum could be recovered through the service charge account. There had been no bill to support the figure of £1638.01; it was just a figure in the company accounts.
25. She confirmed there was an ongoing insurance dispute and understood that the court, not the Tribunal, was the appropriate forum to resolve this. She had picked up a Claim Form but had not yet issued proceedings.

The Determination

26. Nothing Mr Rafati put forward persuaded the Tribunal that the service charge determinations for 2008 or 2009 should be re-opened. In its decision of 18 October 2010 the Tribunal made a final determination that some, but not all, of the legal fees incurred in those years could be charged to the service charge account. That means that each leaseholder is liable to pay their proportionate share of those costs. The fees disallowed cannot be charged to the service charge account. A final decision has been made, there has been no appeal, and the matter is *res judicata*. Any further attempt to challenge the Tribunal's earlier decision on this issue will be a clear abuse of process.
27. While it is correct that in certain carefully prescribed circumstances it may be possible for legal costs incurred by the 'the Landlord' to be recovered from an individual tenant under Schedule 7 paragraph 7.2 of the lease, there is no evidence that any attempt has been made to recover costs from Mrs Kennedy under this clause. Such a charge would be an administration charge, to which Schedule 11 of the Commonhold and Leasehold Reform Act 2002 would apply.
28. The Tribunal has no jurisdiction to decide who should pay costs disallowed by the Tribunal.
29. Accordingly no further determination is made with respect to legal fees and expenses incurred in service charge year 2008-09.

Service charge years 2010 and 2011

The Applicant's case

30. Mr Rafati accepted he had no legal bills to put before the Tribunal for these years. However, due to Mrs Kennedy's failure to pay her service charges, the management company was 'on the verge of bankruptcy'. It could not afford to pay the managing agents or the accountants, and 'after this Tribunal there will be no insurance and no management'. Despite agreeing the service charges for 2010, Mrs Kennedy still had not paid them. Legal advice had been obtained and Mrs Kennedy could be sued but solicitors would need to be employed and there was no money to pay their fees. He asked the Tribunal to determine that any fees incurred should be paid by Mrs Kennedy.

The Respondent's case

31. Mrs Kennedy said she had paid some service charges but not all of them as she still had queries about the demands she was sent. She referred the Tribunal to a letter dated 25 February 2012 that she had sent to the managing agents querying the accounts and demands for 2010 and 2011 and the budget for 2012. She did not think these complied with the last Tribunal decision and there was no accountant's certificate. She had received no reply to this letter. She accepted that she had received a solicitor's letter sent to herself and her mortgagee. There was a budget figure of £2000 for professional fees in 2012 (which she had queried) but she had seen no legal bills incurred in 2010 or 2011.

The Determination

32. The service charge figures for 2010 were agreed by Mrs Kennedy at the last Tribunal hearing. For this reason, that Tribunal made no determination with respect to them. The charges were contained in a document from Fairways Management headed 'Expenditure December 2009 – November 2010, Expenditure All Accounts'. At paragraph 28 of its decision the Tribunal noted that this was not a service charge account that complied with the lease. Nonetheless, insofar as it included expenditure properly chargeable as service charges, Mrs Kennedy agreed the figures. There was no mention of legal fees as a head of expenditure. Furthermore Mr Rafati produced no evidence to this Tribunal of any legal costs incurred in 2010. Accordingly none are allowed as an item of service charge expenditure.
33. With respect to 2011, the Tribunal has not been asked to determine the service charges. Mrs Kennedy agreed the budget for 2011 at the previous hearing. It seems that since then Mrs Kennedy has been sent what purports to be a final service charge account and demand, but there was no evidence that this included any expenditure on legal fees.
34. In reality Mr Rafati is asking the Tribunal to decide, in advance of legal costs being incurred in 2012, that such costs should not form part of a service charge payable by all the leaseholders, but instead should be paid solely by Mrs Kennedy. This is wholly outside the scope of the application. Furthermore, even if the application had mentioned this, it is wholly outside the remit of the Tribunal. The very fact that such a request is being made clearly highlights that both Mr Rafati and the management company are indeed in need of competent legal advice. However the Tribunal cannot say who should pay for this. The parties' attention is drawn to clause 4.3 of the lease,

which refers to the eventuality of the management company failing to carry out its obligations.

Section 20C Application/ Reimbursement of Fee

35. Mr Rafati had misunderstood the nature of a section 20C application. He clarified that what he was in fact seeking was an order requiring Mrs Kennedy to reimburse him for the £250 fee he personally had paid to the Tribunal for this application. Mrs Kennedy pointed out the application was made by the management company, not Mr Rafati.
36. An application under section 20C can only be made by a tenant. Mr Rafati, in his capacity as a tenant, could make such an application but this was not what he asked for, and no section 20C order is made.
37. Although the Tribunal has power, under the Leasehold Valuation Tribunals (Fees) England Regulations 2003, to order one party to reimburse another party for fees paid, the Tribunal makes no such order in this case. This application, by the management company, has failed, and indeed was misconceived from the outset. There is no reason why Mrs Kennedy should have to reimburse Mr Rafati for the application fee.

Concluding Remarks

38. The Tribunal cannot advise either party. However, for the avoidance of doubt, it may be helpful to clarify the present position. Given that the service charges for 2008 and 2009 have been finally determined and the 2010 service charges have been agreed, these are payable by Mrs Kennedy as soon as she receives demands for the correct amounts and in accordance with the lease and statute. If Mrs Kennedy considers the demands are in some way deficient or incorrect, there is no reason why she could not pay the undisputed amount, pending any errors being remedied at the earliest opportunity. It is in all parties' interest for the management company to remain solvent and able to carry out its obligations under the lease. The management company can ensure that accounts are in the proper form and that demands are correct by engaging competent managing agents. Any separate dispute regarding the insurance claim should be resolved at the earliest opportunity, if necessary by proceedings in the county court.
39. Applications to the Tribunal should not be made without having checked that the Tribunal has jurisdiction, and then only if all other attempts to resolve any disagreement have failed. The attention of both parties is drawn to paragraph 10 of Schedule 12 of the Commonhold and Leasehold Reform Act 2002, which permits the Tribunal to make a costs order against a party who acts frivolously, vexatiously, abusively or otherwise unreasonably in connection with the proceedings.

Signed

E Morrison

Chairman

Dated - 23 May 2012