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HM COURTS & TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL

In the matter of a Claim transferred from the County Court (Service Charges and Administration Charges)

Case No. CHI/29UL/LSC/2011/0140

Property: Upper Floors
19-21 Rendezvous Street
Folkestone
Kent
CT20 1EY

Between: Mr. J. Godden (“the Applicant”)

and

Mr. V. Vairaven (“the Respondent”)

Date of Hearing: 11th January 2012

Members of the Tribunal: Mr. R. Norman (Chairman)
Mr. R. Athow FRICS MIRPM
Ms. L. Farrier

Date decision issued: 16th January 2012

**UPPER FLOORS, 19-21 RENDEZVOUS STREET,
FOLKESTONE, KENT, CT20 1EY**

1. During the hearing, agreement was reached that arrears of £12,463.19 in service charges to 31st March 2011 are payable in full by Mr. V. Vairaven (“the Respondent”) to Mr. J. Godden (“the Applicant”). The Tribunal noted that agreement. There remained to be determined by the Tribunal liability for administration charges of £210 and an application for costs.

Decision

2. The Respondent is not liable to pay administration charges of £210 which were claimed.

3. The application for costs is refused.

Background

4. The Applicant is the freeholder of the building known as 19-21 Rendezvous Street, Folkestone, Kent CT20 1EY. The Respondent is the lessee of part of that building namely the first, second and third floors together with separate ground floor/basement entrance ("the subject property").

5. The Applicant commenced proceedings in the County Court (Claim No. 1BE01992) against the Respondent.

6. The Particulars of Claim, dated 3rd August 2011, gave no details of how the service charges of £12,463.19 were calculated and stated that "The Claimant is also entitled to charge for its administration costs to obtain payment of the unpaid charges. The Claimant has to date incurred administration costs of £210.00 and the Claimant also claims this sum."

7. The Respondent in his defence stated "I have not received the details of the money spent in the property nor have I been consulted over the cost, therefore I am in dispute, will require this to refer to leasehold valuation tribunal to be determined whether cost are justifiable."

8. By an Order dated 26th September 2011 those proceedings were transferred to the Tribunal.

9. On 11th October 2011 Directions were issued. Included in the Directions were the following:

- (a) The Respondent to request copies of service charge accounts, demands or other relevant documents which he had not received.
- (b) On receipt of those documents the Respondent to submit a statement in writing setting out in detail exactly which items of service charge he agreed and those he did not agree and why. He was to exhibit to that statement copies of all items of correspondence, documents, witness statements and other documents which he wished the Tribunal to see and to bring the originals to the hearing.
- (c) The Applicant to submit a written statement in reply. That statement was to be accompanied by copies of all items of correspondence, documents, witness statements and other documents which he wished the Tribunal to see and to bring the originals to the hearing.
- (d) That no person would be permitted to give evidence at the hearing unless they had submitted a written witness statement in advance.

10. As far as the Tribunal is aware, the Respondent did not request copies of documents not received.

11. PDC Legal provided an applicant's statement of case signed, in error, as being for and on behalf of the Respondent and copies of some documents.

12. The Respondent then provided a letter in which he stated the following:

(a) That he had no dispute with the insurance premium paid but was disputing maintenance, repair and management fees.

(b) That he had had a lot of complaints from the underlessees, that none of the repairs claimed by the freeholder to have been carried out had been carried out and that the bills were only estimates.

(c) that he was not happy to pay the legal and administrative costs in connection with the service charges.

(d) That he would not be able to attend the hearing on 11th January 2012 but that in his absence Mrs. Lesley Frost of Atrium Property Management would attend.

13. Neither party provided any statements of witnesses they proposed to call to give evidence at the hearing.

Inspection

14. On 11th January 2012 the Tribunal inspected the exterior of the subject property in the presence of Mr. Baker and Mr. Donovan from Fell Reynolds, the Applicant's managing agents, and Mrs. Frost from Atrium Property Management who confirmed that she was there on behalf of the Respondent. It could be seen that the building was on four floors. On the ground floor there were shop premises with residential accommodation on the upper floors. Access to some parts of the building to carry out work to the exterior would be difficult. The gutters were in need of clearing as there was vegetation growing in them.

The Hearing

15. The hearing on 11th January 2012 was attended by Miss Lee of Counsel representing the Applicant and by Mr. Baker and Mr. Donovan and by Mrs. Frost on behalf of the Respondent.

16. On 10th January 2012 hearing bundles prepared on behalf of the Applicant were received at the Tribunal Office. It followed that the members of the Tribunal only received those bundles at the hearing and that Mrs. Frost did not have a copy. The bundles contained very little which had not already been provided and some of the additional material was not relevant to the period the subject of this case. However, the bundle had been paginated which assisted in making reference to documents and the Clerk to the Tribunal lent Mrs. Frost a copy.

17. It was agreed by those present that the period with which the Tribunal was concerned was 2009 to 10th January 2011 and that there was no dispute in relation to the insurance premiums.

18. Miss Lee stated that before the start of the hearing, those present had been able to discuss the case and agreement had been reached on some matters.

19. Mr. Baker understood that all that was now disputed was the cost of a chimney repair and that there was an insurance claim involved. He also stated that he had with him the receipts for work done. The Tribunal pointed out that no receipts for work done had been produced and asked whether Mrs. Frost had seen the receipts. She stated that she had recently requested the receipts and they had been produced.

20. Miss Lee stated that the accounts produced before the hearing contained some inaccuracies and produced three pages of accounts which she stated corrected the inaccuracies. Copies were provided to the Tribunal and to Mrs. Frost.

21. The Tribunal gave those present the opportunity to discuss the case to clarify exactly what was still disputed. The Tribunal expressed its concern that Mrs. Frost could be at a disadvantage, especially as some documents had only just been produced, and stated that she should not feel under pressure to reach agreement. After about 35 minutes the Tribunal was informed by Miss Lee and Mrs. Frost that the Respondent accepted that the arrears of £12,463.19 were payable in full. Asked if Mrs. Frost had been able to obtain any instructions from the Respondent, she said she had telephoned him and confirmed that, as previously stated he had no problem with the insurance, that he was happy with the management fees and accepted the charge for repairs. The Tribunal chairman announced that it would be noted in the decision of the Tribunal that the Respondent accepted that he owes £12,463.19 in respect of service charges to 31st March 2011.

22. There remained the question of the administration charge of £210 and in addition Miss Lee made an application for costs.

23. Miss Lee referred to clause 3 (x) of the lease which contains a covenant by the Tenant with the Landlord and with and for the benefit of the owners for the time being of the other premises as appropriate "To pay all expenses (including Landlord's solicitors' costs and surveyors fees) incurred by the Landlord incidental to the preparation and service of notice under Section 146 of the Law of Property Act 1925 notwithstanding that forfeiture is avoided otherwise than by relief granted by the court". Miss Lee submitted that under that clause the Respondent is liable for the administration charge of £210 as these proceedings are incidental to the preparation and service of a Section 146 notice because the Applicant had to take this step of going to the Tribunal before he could prepare such a notice. She explained that the sum of £210 had two elements. The charge of £60 was the charge made by Fell Reynolds for preparing all that was required by PDC, the debt collection agents. They are not solicitors and entirely separate from PDC Legal who are the solicitors who instructed Miss Lee. The charge of £150 was the charge made by PDC for writing at least three reminders to the Respondent followed by a final warning letter before passing the matter on to solicitors. Miss Lee asked for a short adjournment to obtain case law in support of her submission. This was granted and she returned with the case of Freeholders of 69 Marina and others v Oram and another in the

Court of Appeal (Civil Division). She referred to Paragraph 20 in which the Court said that in those circumstances "Given that the determination of the Tribunal and a s. 146 notice are cumulative conditions precedent to enforcement of the Lessees' liability for the Freeholders' costs of repair as a service charge it is, in my view, clear that the Freeholders' costs before the Tribunal fall within the terms of clause 3(12)." That case was an application brought by the freeholders for arrears of service charges and the Tribunal found in favour of the freeholders and awarded the freeholders' administration costs and charges. She submitted that the clause in that case was similar to that in the present case but accepted it was wider.

24. Miss Lee made an application for costs, which by Paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002, cannot exceed £500. She asked the Tribunal to bear in mind that it had now transpired that the arrears were properly payable and accepted back to 2009 and should be paid. It was regrettable that the Applicant had had to bring a claim in the County Court, which had then been transferred to the Leasehold Valuation Tribunal. The costs to date were £1,625 + VAT. If the Respondent had taken a more reasonable approach the application could have been avoided. As far as accounts, invoices and receipts were concerned they were always available at the Applicant's managing agents' premises and the Respondent had changed his correspondence address both before and after proceedings had been commenced and she thought he had changed agents a couple of times. He had been difficult to get hold of and this was one of the factors which led to a misunderstanding between the parties. The sum claimed was not insubstantial and the costs were proportionate. The application for costs was made on the basis that the Respondent had behaved unreasonably in connection with the proceedings and Miss Lee asked the Tribunal to construe the phrase "acted ...otherwise unreasonably ..." to include when a party unreasonably defends or opposes an application or part of it.

Reasons

25. In the 69 Marina case, the clause in the lease dealing with liability for expenses concerning a Section 146 Notice was much wider than in the present case. The part which is relevant to this case as quoted in paragraph 2 of the decision reads as follows:

"To pay all expenses including solicitors' costs and surveyors' fees incurred by the Landlord incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 or incurred in or in contemplation of proceedings under Section 146 or 147 of the Act notwithstanding in any such case forfeiture is avoided otherwise than by relief granted by the Court..."

Under that clause, payment could be claimed not only for expenses incurred incidental to the preparation and service of a notice under Section 146 but also expenses incurred in or in contemplation of proceedings under Section 146.

26. The Tribunal considered the decision in the 69 Marina case and the wording of the appropriate covenant in that lease compared with the appropriate covenant in the lease

of the subject property and came to the conclusion that the narrower wording of the latter did not extend to the managing agents' charges for preparing instructions to a debt collector or to the charges of the debt collector writing to the Respondent to try to collect the service charges. The Tribunal found that the tasks for which those charges were claimed were too remote to be considered to be "incidental to the preparation and service of notice under Section 146 of the Law of Property Act 1925". Had the clause included, as in the 69 Marina case, "contemplation of proceedings under Section 146" then further consideration would have to have been given. Had the Tribunal come to the conclusion that the clause did allow the Applicant to claim such expenses, the Tribunal would have determined that the charge of £150 would not have been payable as it was not reasonable in the circumstances to include the additional step of referring the matter to debt collectors as they could do little, if anything, more than the managing agents had done to recover the debt and that proved to be the case. Instead, the reasonable next step would have been to commence proceedings in the County Court. Similarly, as it was submitted to the Tribunal at the hearing that the charge of £60 was the charge made by the managing agents for preparing instructions to PDC to collect the service charges from the Respondent, rather than preparing instructions to solicitors to commence proceedings, that too was part of an unnecessary and unreasonable step in the circumstances of this case and would not have been payable.

27. The Tribunal considered the application for costs. Miss Lee had submitted that the Respondent had changed his correspondence address and had changed agents and had been difficult to get hold of but there was no evidence that there had been any difficulty in corresponding with him at the address on the County Court papers. The Respondent should have requested sight of receipts for work carried out but apparently he did not do so. However, it was clear from his defence in the County Court, before the matter was transferred to the Tribunal, that he was complaining that he had not received details of the money spent on the property. Once Mrs. Frost requested copies they were provided and when she had the opportunity of discussion with the Applicant's managing agents the matter was agreed. Clearly the Applicant's managing agents considered the receipts to be important, as they brought them to the hearing, but they did not produce them along with the statement of case as documents on which the Applicant sought to rely. Had they done so it may well be that this matter would have been settled much earlier and time and expense saved. The documents supplied to the Tribunal on behalf of the Applicant provided no detail of the repairs and in the circumstances it was not unreasonable for the Respondent to continue to contest the matter. Consequently the Tribunal was not satisfied that the provisions of Paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 were satisfied and no order for costs could be made.



R. Norman
Chairman