

S45



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

Case Reference : **MAN/00EQ/LBC/2013/0006**

Property : **5 Heathlands House, Gaskell Avenue,
Knutsford, Cheshire WA16 0DB**

Applicants : **A M Kennedy
S C Warburton
S A M Fitzgerald**

Representative : **N/A**

Respondent : **Mottcombe Lowndes Limited**

Representative : **N/A**

Type of Application : **Commonhold & Leasehold Reform
Act 2002 – section 168(4)**

Tribunal Members : **Judge J Holbrook
Judge L Bennett**

**Date and venue of
Hearing** : **Determined on the papers**

Date of Decision : **22 November 2013**

DECISION

DECISION

A breach of a covenant in the lease of the Property (dated 15 June 2001) has occurred by reason of the tenant having altered the Property without obtaining the consents required by the lease.

REASONS

Background

1. On 20 May 2013 an application was made to a leasehold valuation tribunal for a determination that a breach of a covenant or condition has occurred in a lease of a property known as 5 Heathlands House, Gaskell Avenue, Knutsford, Cheshire WA16 0DB ("the Property").
2. The lease in question ("the Lease") is dated 15 June 2001 and was made between Antler Homes North West PLC (1) Heathlands Knutsford Management Company Limited (2) and Andrew David Belfield (3). It was granted for a term of 999 years from 1 January 2001 at an initial yearly rent of £120.
3. The application was made by Mr A M Kennedy, Mr S C Warburton and Ms S A M Fitzgerald of Gaskell Avenue Dental Practice, who own the reversionary interest in the Property and are the current landlord under the Lease. The application was made on the basis of an alleged breach of a covenant against making alterations to the Property without consent.
4. The Respondent to the application is Mottcombe Lowndes Limited, the company in which the leasehold interest in the Property is currently vested.
5. On 1 July 2013 the functions of leasehold valuation tribunals transferred to the First-tier Tribunal (Property Chamber) ("the Tribunal") and so this matter now falls to be determined by the Tribunal.
6. On 24 June 2013 directions were given for the conduct of the proceedings. The parties were informed that this matter was considered suitable for a determination without an oral hearing unless either party gave notice that they wished a hearing to be listed. As no such notification was received, the Tribunal proceeded to determine the matter on the basis of the evidence provided in the application and in written submissions provided by the parties in response to directions. The Tribunal did not inspect the Property.

Law

7. A prerequisite for the forfeiture of a lease (otherwise than for a breach of a covenant to pay rent) is the service of a notice under section 146(1) of the Law of Property Act 1925. However, section 168(1) of the Commonhold and Leasehold Reform Act 2002 provides that a landlord under a long lease of a dwelling may not serve such a notice unless section 168(2) of the 2002 Act is satisfied.
8. One of the ways in which section 168(2) may be satisfied is for it to be finally determined by the Tribunal (upon an application by the landlord under section 168(4)) that a breach of a covenant or condition in the lease has occurred.

The Lease

9. Clause 2 of the Lease provides that the tenant covenants with the landlord and with the management company to observe and perform the obligations set out in the fifth and sixth schedules to the Lease. Paragraph 9(i) of the fifth schedule states:

“The Lessee shall not make any alterations to the Property without the approval in writing of the Lessor and the Company to the plans and specifications thereof and shall make such alterations only in accordance with such plans and specifications when approved”

Evidence and submissions

10. The Applicants allege that the Respondent has altered the Property without obtaining the consent of the landlord or the management company and that a breach of paragraph 9(i) of the fifth schedule to the Lease has therefore occurred.
11. Photographic evidence was provided of the front elevation of the Property and of neighbouring properties. The Property is a townhouse of modern brick construction. As originally constructed, it had an integral garage beneath the living accommodation. However, it is apparent that the garage has now been converted into additional living accommodation. A copy of the application for planning permission was produced, together with a copy of an objection thereto by one of the Applicants. The objection was made on the basis that a reduction in the overall availability of parking spaces for the development which includes the Property would have a knock-on adverse effect for other residents.
12. The Respondent's submission asserted that the terms of the Lease are unreasonable and complained about the operation of the service charge. It also expressed the view that the original garage was too small to use for car parking and that it is unreasonable for the landlord to dictate what the internal space is used for.

Conclusion

13. The Respondent does not deny that alterations have been made to the Property. Nor does the Respondent dispute that the alterations were made without obtaining the consent of the landlord and management company, as required by the Lease. The fact that the Respondent may have concerns about the operation of the service charge or, indeed, about the reasonableness of particular covenants in the Lease, is not relevant to the question of whether there has been a breach of any of those covenants. It is clear that there has been a breach of the covenant in paragraph 9(i) of the fifth schedule.



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

Case Reference : **MAN/36UD/LSC/2013/0106**

Property : **Flat 2, 117 East Parade,
Harrogate, North Yorkshire
HG1 5LR**

Applicant : **Mr Raymond Buckley**

Representative : **Hart Law LLP, Solicitors**

Respondent : **Mrs Samantha Anne Warner**

Representative : **N/A**

Type of Application : **Landlord and Tenant Act 1985 – s27A**

Tribunal Members : **Judge J Holbrook (Chairman)
Judge L Bennett**

**Date and venue of
Hearing** : **Determination on the papers**

Date of Decision : **26 November 2013**

DECISION

DECISION

In respect of the 2013 service charge year, Mrs Warner is liable under the Lease of the Property to pay a service charge to Mr Buckley in the amount of £929.94.

REASONS

Background

1. On 27 June 2013 Mr Buckley made an application to a leasehold valuation tribunal under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for a determination of the liability of Mrs Warner to pay service charges in relation to Flat 2, 117 East Parade, Harrogate, North Yorkshire HG1 5LR ("the Property"). Mrs Warner is the long leaseholder of the Property under a 100 year lease ("the Lease") granted on 25 May 1978.
2. Mr Buckley is the current landlord under the Lease, and he seeks a determination in respect of the 2011, 2012 and 2013 service charge years.
3. An action for forfeiture of the Lease is presently before the county court. That action was stayed on 24 June 2013 by order of Deputy District Judge McClure sitting at Harrogate County Court pending the tribunal's determination.
4. On 1 July 2013, the functions of leasehold valuation tribunals transferred to the First-tier Tribunal (Property Chamber) ("the Tribunal") and so this matter now falls to be determined by the Tribunal.
5. The parties were informed that the applications would be determined on the basis of written representations alone, without an oral hearing, unless either party gave notice that they required an oral hearing to be held. No such notice was received. The Tribunal therefore proceeded to determine the matter on the papers alone. In addition to Mr Buckley's application form, the Tribunal had before it a statement of case and a bundle of documentary evidence submitted by his solicitors. This had been copied to Mrs Warner. However, no submissions were received from her in response to the Tribunal's directions or otherwise.
6. The Tribunal did not inspect the Property.

Law

7. Section 27A(1) of the 1985 Act provides:

An application may be made to the appropriate tribunal for a determination whether a service 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.*

8. The Tribunal has jurisdiction to make a determination under section 27A of the 1985 Act whether or not any payment has been made.
9. However, by virtue of section 27A(4)(c), no application may be made under subsection (1) in respect of a matter which has been the subject of a determination by a court.
10. The meaning of the expression "service charge" is set out in section 18(1) of the 1985 Act. It means:

... 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.*

11. In making any determination under section 27A, the Tribunal must have regard to section 19 of the 1985 Act, subsection (1) of which provides:

Relevant costs shall be taken into account in determining the amount of a service charge payable for a period-

- (a) only to the extent that they are reasonably incurred, and*
 - (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;*
- and the amount payable shall be limited accordingly.*

12. "Relevant costs" are defined for these purposes by section 18(2) of the 1985 Act as:

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.

Jurisdiction

13. The first issue to be decided is that of whether the Tribunal has jurisdiction to make a determination in respect of each of the three years for which a determination is sought. In particular, does the fact

that Mrs Warner's service charge liability has been the subject of previous county court proceedings mean that the Tribunal must decline to make a determination of her liability for 2011 and 2012 because section 27A(4)(c) of the 1985 Act applies?

14. It is evident (not least from the fact that forfeiture proceedings are currently ongoing) that there has been a difficult history between the parties when it comes to the recovery of service charges under the Lease. Mr Buckley has successfully brought county court proceedings against Mrs Warner on a number of occasions. In particular, Mr Buckley obtained default judgment from Leeds County Court on 3 October 2011, in respect of his claim for payment of the 2011 service charge. In addition, on 17 October 2012, Mr Buckley obtained default judgment from the Northampton County Court in respect of his claim for payment of the 2012 service charge. Does this mean that Mrs Warner's service charge liability for 2011 and 2012 "has been the subject of a determination by a court"?
15. In response to the Tribunal's invitation to make representations on this issue, Mr Pickworth (Mr Buckley's solicitor) submitted that the default judgments do not engage section 27A(4)(c). He cited the 2006 decision of Wandsworth County Court in *Hillbrow (Richmond) Limited v Alogaily* as authority for the proposition that a default judgment is not a "determination" because it does not entail a substantive judicial decision about the matter in dispute. The *Hillbrow* case concerned the question of when the payability of a service charge is finally determined for the purposes of section 81(1) of the Housing Act 1996, but Mr Pickworth submitted that the principle is the same under the 1985 Act. We accept that to be the case. Nevertheless, Mr Pickworth's submission fails to recognise that there is more recent authority which conflicts with the decision in *Hillbrow*. The case of *Church Commissioners for England v Koyale Enterprises & anor* [2012] L&TR 24 was decided in 2011 by HH Judge Dight sitting in Central London County Court, and was again concerned with the requirements of section 81 of the 1996 Act. The judge held that he had "no hesitation" in concluding that a default judgment is a final determination for the purposes of section 81.
16. We adopt the reasoning in the more recent of these conflicting authorities and thus conclude that, whilst the Tribunal has jurisdiction to determine Mrs Warner's 2013 service charge liability, it has no jurisdiction to do so for 2011 or 2012. Nevertheless, it obviously follows from the *Church Commissioners* case that, for the purposes of section 81 of the 1996 Act, Mr Buckley already has final determinations of Mrs Warner's service charge liability for 2011 and 2012.

2013 service charge liability

17. The third schedule to the Lease provides for the payment of a service charge by the tenant. Paragraph 2 defines the amount of the service charge as:

“a sum equal to one half of the annual service cost which is hereby defined as the aggregate of the sums expended or liabilities incurred by the Lessor in each year of the term ... in connection with the maintenance of the building and the provision of services and insurance in respect thereof in accordance with the covenants on the part of the Lessor contained in Clause 4 hereof and (1) all reasonable fees charged and expenses payable to any Solicitor Accountant Surveyor Agent Architect or other person or persons firm or company whom the Lessor may from time to time employ in connection with the maintenance and/or management of the property or the collection of the rent and service charge (2) ... (3) ... (4) ... (5) all administration costs and other costs incurred by the Lessor including such reasonable sum as the Lessor or his managing agents may from time to time consider necessary for the creation and maintenance of a reserve fund for the purpose of the maintenance and management of the building.”

18. Clause 4(3) of the Lease requires the landlord to insure the building and to repair and maintain the fabric of the building and its internal common parts.

19. Mr Buckley claims that the following amounts are payable by Mrs Warner in respect of the 2013 service charge:

Ground rent	£ 25.00
One third of the insurance premium	£ 229.94
Sinking fund	£ 200.00
Management charges	£ 500.00
Court costs and legal fees	£2,078.75

Total	£3,033.69

20. The Tribunal’s function under section 27A of the 1985 is to determine the payability and/or reasonableness of a “service charge” as that expression is defined in section 18(1). If a cost or expense does not fall within that definition then, irrespective of the fact that it may be labelled as a service charge in the Lease, the Tribunal may not, under section 27A, determine whether it is payable or reasonable. In the present case, it is clear that ground rent is not a service charge – it is not payable for services, repairs etc. Nor do we consider that the county court costs and legal fees which Mr Buckley has incurred in pursuing Mrs Warner can properly be regarded as a service charge – these are not management costs to be borne by all the tenants, but are in the nature of an administration charge which Mr Buckley seeks to recover from Mrs Warner only.

21. Although the items which cannot properly be regarded as service charges must be excluded from the amount which the Tribunal determines to be payable under section 27A, the other three heads of expense are service charges within the meaning of section 18(1). They

are also heads of expense which fall within the scope of the third schedule to the Lease. Mrs Warner has had ample opportunity to challenge the reasonableness of these expenses, but she has evidently chosen not to do so. We therefore determine them to be reasonable and to be payable in full.