9694

FIRST –TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	**CHI/45UH/LIS/2013/0069**
Property:	**First Floor Flat, 6 Woburn Court, Richmond Road, Worthing, West Sussex BN11 4AE**
Applicant:	**Woburn Court Tenants Association Limited**
Representative:	**Kevin Pain counsel instructed by Green Wright Chalton Annis, Solicitors**
Respondent:	**Mark Steven Graham**
Representative:	**Andrew James Graham**
Type of Application:	**Service Charge in accordance with section 27A Landlord and Tenant Act 1985 (1985 Act)**
Tribunal Members:	**Judge Tildesley OBE**
Date and venue of Hearing:	**9 October 2013 at Tribunal Offices, Market Street, Chichester which was adjourned for further representations**
Date of Decision	**12 December 2013**

DECISION

DECISION

Summary of Decision

1. The Respondent agreed unconditionally his liability to pay the disputed service charges. The Tribunal, therefore, has no jurisdiction to determine the Respondent's liability to pay the service charges for the period from 29 September 2007 to 29 September 2013 (inclusive). The Tribunal's decision, however, does not extend to the legal costs which were later added to the charges.

2. There is no authority under the lease which enables the Applicant to recover legal costs as part of the service charge, in which case a section 20C order is unnecessary.

3. If the Tribunal is wrong about no authority under the lease, the Tribunal would make an order under section 20C of the 1985 prohibiting the Applicant from recovering 50 per cent of its costs through the service charge in connection with the proceedings before the Tribunal.

4. The Tribunal requests the Applicant to provide the Respondent, if it has not already done so, with a breakdown of the legal costs of £2,211.94 to enable the Respondent to make an informed decision about whether to bring an application challenging the reasonableness of the legal costs.

Introduction

5. On 9 October 2013 a case management hearing was convened in respect of the Applicant's application to determine the Respondent's liability to pay service charges for the years ending 29 September 2007 to 29 September 2013 (inclusive).

6. At that hearing the Applicant contended that the Tribunal had no jurisdiction to determine the application because the Respondent had admitted liability to pay the service charges for the said period. After hearing the parties' representations the Tribunal expressed a provisional view in favour of the application but decided in the interests of the overriding objective to adjourn the final determination so as to give the Respondent the opportunity to take legal advice and submit additional representations in writing.

7. The Tribunal invited representations on whether it had jurisdiction to continue with the application for service charges, and whether an order should be made under section 20C of the Landlord and Tenant Act 1985. The Tribunal also indicated that it would determine the question of jurisdiction on the matters presented at the hearing on 9 October 2013 and any written representations without recourse to a further oral hearing.

8. The Tribunal received two submissions from the Respondent dated 31 October 2013 and 20 November 2013, and one reply from the Applicant dated 11 November 2013.

9. This decision should be read with that for the case management hearing dated 9 October 2013.

The Law

10. Section 27A(1) of the 1985 Act enables an application to be made to the tribunal to determine whether a service charge is payable.

11. Section 27A(4), however, provides that

> "No application under subsection (1) or (3) may be made in respect of a matter which -
>
> (a) has been agreed or admitted by the tenant."

12. Section 27A(5) states that

> "But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment."

The Issue

13. The issue to be determined is whether the Respondent's signed and dated endorsement on the outstanding invoice dated 26 June 2013 which said "*I agree the outstanding service charges due to Woburn Court Tenants Association Limited as set out in this statement*" constituted an agreement or admission within the meaning of section 27A(4)(a). If it did, the Tribunal has no jurisdiction to hear the application. The question of jurisdiction is not a matter of Tribunal discretion either the Tribunal has jurisdiction or it does not.

14. The Tribunal interprets section 27(A)(4)(a) as including agreements or admissions made after making the application. In the Tribunal's view, the application of section 27A(4) is not restricted to agreements or admissions in existence at the time the application is made which is a possible construction of the words used: *no application may be made in a respect of a matter which* ***has been*** *agreed or admitted.* Such a construction is too narrow and fails to reflect the nature of section 27(4)(a) which is a restatement of general principles that a Tribunal has no standing to adjudicate on matters which have been expressly agreed by the parties in inter partes disputes, and of the requirement for certainty and finality in litigation.

15. The Tribunal applies the ordinary and natural meaning of the words: *agreed* and *admitted.* Agreed refers to acceding to some proposal or

suggestion or settling by mutual consent. Admitted means accepted or recognised as true or valid.

16. The Tribunal considers the issue to be determined is principally one of fact.

Chronology

17. On 24 May 2013 the Applicant sought a determination that service charges levied against the Respondent by the Applicant in respect of the years ending 29 September 2007 to 29 September 2013 inclusive were payable and reasonable in amount. The sum outstanding was £7,183.51.

18. On 3 June 2013 Judge Agnew issued directions to progress the Application. Under the directions the Applicant and the Respondent were required to provide their statements of case by 3 July 2013 and 31 July 2013 respectively. A target hearing date was fixed for the 20 September 2013.

19. On 14 June 2013 the Respondent wrote to the Applicant's representatives. The Respondent said that he had refused to pay his contribution to the planned works because of case law where a person had bought a property from a local authority and was not told of the works. The Respondent then went onto say that he now understood that he must claim the amount of the planned works from the vendor who in turn would then claim against the managing agents. The Respondent apologised for his mistake and then set out seven points questioning the standard of the works done. The Respondent ended his letter with the comment:

> "Having said all this I am willing to have the outstanding amounts charged regardless of the amount of any rebate that myself and the residents receive for serious failures mentioned, once I and all residents receive a loft access key and we agree the final account to date. There is no doubt that a Tribunal would award something for the above but I now accept that I am due to pay for the renovations".

20. On 1 July 2013 the Applicant's solicitors wrote to the Tribunal saying that

> "... The Applicant is due to file its statement of case and evidence by 3 July. However, the managing agents have been in discussion with the Respondent and we are advised that the parties have resolved the issues previously raised by the Respondent, and that he now accepts the outstanding maintenance charges are due".

21. The Applicant's solicitors advised further that they had written to the Respondent requesting him to confirm his position, and that they would report to the Tribunal to confirm the agreement reached between the parties. Finally the solicitors stated that

> "As the parties are now in meaningful discussions may we please have an extension until 17 July to file the Applicant's statement of case and evidence".

22. On 1 July 2013 the Tribunal agreed to extend the period for directions by two weeks so as to allow the parties time to reach an agreement. The Tribunal informed the Respondent by letter to his correct address of the extension and enclosed copies of the correspondence from the Applicant's solicitors.

23. On 1 July 2013 the Applicant's solicitors also replied to the Respondent's letter of 14 June 2013. The solicitors advised that they had taken further instructions form their client and been informed that the Respondent had spoken directly to Mr Putnam from the management company. The letter went on to record the understanding of the Applicant's solicitors that the Respondent was willing to accept liability to pay the outstanding service charges. In this regard the Applicant's solicitors asked the Respondent to sign one of the duplicate statements where indicated and return it as soon as possible. The letter concluded that if the Respondent was uncertain as to his position in the matter he should seek separate independent legal advice.

24. Around 8 July 2013 the Respondent returned the schedule of service charges with the total amount due of £7,183.51 to the Applicant suitably endorsed, signed and dated. The endorsement read:

> "I agree the outstanding service charges due to Woburn Court Tenants Association Ltd as set out in this statement".

25. On 12 July 2013 the Applicant's solicitors wrote to the Tribunal indicating that the parties had agreed the outstanding charges and accordingly withdrew the Application. The Tribunal accepted the withdrawal by way of letter dated 15 July 2013 which was sent to both parties.

26. Following the withdrawal of the Application before the Tribunal, the Applicant served the Respondent with a section 146 Notice in the sum of £7,183.51. On 6 August 2013 the Respondent's mortgagee paid the Applicant the outstanding sum plus solicitors' costs in the sum of £2,211.94.

27. On the 2 September 2013 the Applicant wrote to the Tribunal to the effect that he did not consent to the withdrawal. Further the Applicant asserted that the payment of the outstanding amount was made on condition that the final account was agreed and that all residents received a loft key.

28. On 5 September 2013 Judge Agnew directed the re-instatement of the case and that a case management conference would be held which was later arranged for 9 October 2013. The directions indicated that the purpose of the case management conference which was to explore the possibility of the parties reaching a final and unconditional settlement of the matters, failing which further directions would be issued to bring the case to a conclusion.

Parties' Submissions

29. The Applicant submitted that the endorsement was an admission for the purpose of section 27A(4) of the Act. The Applicant pointed to the actual wording used in the endorsement which in its view was more than a simple acknowledgement of the Applicant's claim. According to the Applicant, the phraseology used of *agree* and *the outstanding charges due to* had the hallmarks of an express admission of liability.

30. The Applicant considered the events leading to the Respondent's endorsement and the contents of its solicitors letter dated 1 July 2013 reinforced its view that the Respondent had accepted liability for the disputed charges.

31. The Applicant believed it was the recovery of the legal costs of £2,211.94 in connection with the dispute that may well have caused the Respondent to revisit his admission. The Applicant argued that the question of legal costs was not relevant to the question of the Respondent's admissions on his liability to pay £7,183.51 for the outstanding service charge.

32. The Applicant urged the Tribunal not to make an order under section 20C, particularly as the Respondent had not made any representations on this topic. If the Tribunal was minded to consider such an order the Applicant suggested that the Tribunal should have regard to the fact that the costs had been incurred because of the Respondent's failure to pay the service charges, and his retraction of the admission of liability.

33. Finally the Applicant stated that section 20C had no application to the costs of £2,211.94 which had been sought from the Respondent pursuant to a personal covenant at clause 3(D) of the lease.

34. The Respondent's principal submissions were set out in his response received 31 October 2013. His second response of 20 November 2013 repeated some of the points made earlier, and raised concerns about the judicial handling of the proceedings which were not relevant to the disputed issue and which have been referred to the Chamber President for her consideration.

35. The Respondent questioned whether a Tribunal of one had the competence to determine this issue. The Respondent also considered that the Applicant had not complied with Tribunal directions and had ambushed the proceedings on 9 October 2013 with its preliminary applications on jurisdiction. The Respondent also considered the Tribunal had usurped the directions issued by Judge Agnew.

36. The Respondent maintained that he had not altered his position from that stated in his letter of 14 June 2013. His position was that, although he accepted the amount of the outstanding charges, he still disputed the reasonableness of the charges for the works done. Further he had never agreed to pay the legal charges of £2,211.94. The wording of the endorsement

supported his interpretation of the events and that he was only agreeing to the amount of the outstanding charges.

37. The Respondent denied that he had received the solicitors' letter of 1 July 2013 addressed to him. Further the Respondent stated that he was unaware of the application being withdrawn, and that he had not agreed to the cancellation of the Tribunal proceedings. His expectation was that the negotiations would continue with the Applicant, and if unresolved would be determined by the Tribunal.

Consideration

38. The Tribunal starts with the questions asked by the Respondent about the Tribunal's competence and the status of the previous directions.

39. The Senior President of Tribunal's Practice Statement on the Composition of Tribunals permits a Judge of the First Tier Tribunal or another member of the First Tier Tribunal who has been authorised to chair proceedings sitting alone to make a decision that disposes of proceedings.

40. The Tribunal disagrees with the Respondent's contention that the Applicant failed to comply with directions. The Applicant kept the Tribunal informed of developments in the case and requested an extension of the time limits before they expired. The Tribunal granted the extension and subsequently acceded to the Applicant's withdrawal of the application before the new deadline for the production of the Applicant's bundle.

41. The Tribunal's decision to entertain the Applicant's application regarding jurisdiction did not subvert Judge Agnew's directions to reinstate the case and hold a case management hearing. Judge Agnew's decision was based solely on the Respondent's representations and concerned with the legal requirements for the withdrawal of an application. Judge Agnew did not examine the circumstances giving rise to the Applicant's submissions on the applicability of section 27A(4)(a) of the 1985 Act.

42. The Tribunal accepts that the Respondent had short notice of the Applicant's application on jurisdiction. The Tribunal took steps to ameliorate potential prejudice to the Respondent of the short notice by giving an indication of the Tribunal's provisional position and adjourning the proceedings to enable the Respondent to take advice and make further representations. The Tribunal, however, considers the short notice is a relevant to the question about the making of a section 20C order.

43. Turning to the substantive issue the Tribunal finds on the following facts that the Applicant had agreed liability to pay the outstanding service charges for the years in question.

44. The Tribunal is satisfied that the words of the Respondent's endorsement on the service charge schedule demonstrated his acceptance of liability for the

service charges. The endorsement incorporated the word *agree,* and the phrase *outstanding charges due to the Applicant.* The endorsement made specific reference to the individual service charges specified in the statement. The Respondent added no qualification to the endorsement.

45. The Tribunal considers the Respondent's decision to append his signature to the endorsement was a natural development from the stance taken in his letter of 14 June 2013. It was clear from the contents of the letter, the Respondent's position had mellowed and that he was looking to settle the dispute. The Tribunal does not accept the Respondent's contention that the endorsement was simply a restatement of his position on the 14 June. The language used in the two documents denoted a change in the Respondent's stance from *willing to have the amounts charged* to *agreeing that the outstanding charges are due.* In the Tribunal's view such a change was unsurprising given that the parties had been in discussion.

46. The Tribunal does not accept the Respondent's interpretation that the endorsement was limited to the amount owed and left open questions of validity and reasonableness. The Respondent imposed no caveat to that effect on his endorsement. Further the Respondent had a good understanding of service charges and must have been aware when endorsing the schedule that service charges were only payable if they were reasonable.

47. The Tribunal holds that the wording and tone of the letter from the Applicant's solicitors dated 1 July 2013 to the Respondent which enclosed the service charge schedule confirmed that an agreement had been reached on the Respondent's liability to pay the service charges. The letter mentioned that discussions had taken place with a view to resolving matters amicably and that the Respondent was willing to accept liability. The letter also advised the Respondent of his right to seek separate independent legal advice. Finally the letter informed the Respondent of the Applicant's intention to advise the Tribunal of the agreement.

48. The Respondent stated in his submissions that he did not receive the 1 l July letter from the Applicant's solicitors and the other correspondence in connection with the withdrawal of the Application. The 1 July letter was sent to the Respondent's correct address and enclosed the schedule which the Respondent returned. The Tribunal sent letters dated 1 July 2013 and 15 July 2013 to the Respondent at his correct address. The letter of 1 July informed the Respondent of the variation in the directions and also enclosed the solicitors' letter of the 1 July to the Tribunal. The letter of the 15 July advised the Respondent that the Application had been withdrawn.

49. The Tribunal does not accept the Respondent's statement that he did not receive the letters referred to in the above paragraph. The letters were sent by prepaid post to his correct address and service is presumed to be effected unless the contrary is proved. The Respondent adduced no persuasive evidence that he did not receive the letters.

50. The facts also indicated that he saw the disputed letters. He returned the enclosure which was included in the 1 July solicitors' letter addressed to him. The Respondent saw the other Tribunal letters sent to him at his address at Woburn Court, Worthing. This included a copy of the Application posted on 4 June 2013 and the correspondence dated 6 September and 20 September 2013 dealing with the reinstatement and the case management hearing. The Tribunal considers it improbable that the Respondent would see some letters from the Tribunal but not those letters which adversely affected his case.

51. The implications of the Tribunal's finding that the Respondent received the correspondence sent in July were that he knew about the Applicant's statements to the Tribunal on the purported agreement, and of the Tribunal's decision to consent to the withdrawal. Given those circumstances the fact that the Respondent did not challenge the contents of the letters until 2 September 2013 suggested that he was in agreement with what was being said by the Applicant in July. It was only later when the legal costs were added to the outstanding charges that he changed his mind. In the Tribunal's view, the Respondent's disagreement on the legal costs did not compromise his prior admission of liability for the service charges.

52. The Tribunal concludes that the Respondent agreed unconditionally his liability to pay the disputed service charges. The Tribunal is satisfied that the Respondent is not entitled to resile from his agreement because of the subsequent addition of legal costs. The Tribunal decides that it has no jurisdiction to determine the Respondent's liability to pay the service charges for the period from 29 September 2007 to 29 September 2013 (inclusive). The Tribunal's decision, however, does not extend to the legal costs which were later added to the charges.

53. The Tribunal now considers whether an order should be made under section 20C of the 1985 Act which would prevent the Respondent from recovering through the service charge its costs in connection with the Tribunal proceedings.

54. The Tribunal was unable to identify the clause in the lease which enabled such costs to be taken into account when determining the amount of service charge payable. Applicant's counsel did not refer to an authority under the lease in his submissions on section 20C. The only clause in the lease which gave the Applicant power to recover legal costs was clause 3D which was a personal covenant on the Respondent's part. In these circumstances a section 20C order is unnecessary because the Applicant cannot regard the costs as part of the service charge under the lease.

55. If the Tribunal is wrong on its interpretation of the lease it would be minded to make a partial order under section 20C. The Tribunal disagrees with the Applicant's observation that there was no application under section 20C before the Tribunal because of the Respondent's failure to make submissions. The question of a section 20C application was mentioned at the case management hearing on 9 October 2013. Further the Respondent's

grievance with the perceived unfairness of the additional charges for legal costs was at the heart of the current dispute and permeated his representations to the Tribunal.

56. The criterion for making an order under section 20C is whether it is just and equitable in the circumstances. Usually the fact that the Respondent had been unsuccessful in the proceedings would weigh heavily against making such an order. The Tribunal, however, considers there are extenuating circumstances which justify the making of some form of order under section 20C. Those circumstances include that

(1) The Respondent initially adopted a constructive approach with the Applicant which resulted in the Applicant withdrawing the substantive proceedings, and so avoiding the costs of preparing bundles and of attending a hearing.

(2) The Respondent's change of mind was prompted by the Applicant choosing to add legal costs to the section 146 Notice which was not part of the original agreement and appeared to come out of the blue.

(3) The Applicant's notice of application regarding jurisdiction was served on the Respondent at short notice which necessitated an adjournment of the hearing and further representations.

57. Having regard to the above facts the Tribunal would make an order under section 20C of the 1985 prohibiting the Applicant from recovering 50 per cent of its costs through the service charge in connection with the proceedings before the Tribunal.

58. Finally the Tribunal wishes to address the question of the legal costs in the sum of £2,211.94. The Tribunal did not examine the circumstances of these costs at the hearing on 9 October 2013 because it accepted counsel's observation that they were not part of the service charge proceedings. Counsel, however, in his later submissions characterised the costs as variable administration charges which means that the Tribunal has jurisdiction to determine their reasonableness if an application is made by the Respondent. The Tribunal notes that clause 3D which authorised such costs was narrow in its scope. The Tribunal also considers the adding of these costs to the service charge bill was the cause of the current dispute. Given these circumstances the Tribunal requests the Applicant to provide the Respondent, if it has not already done so, with a breakdown of the legal costs to enable the Respondent to make an informed decision about whether to bring an application challenging the reasonableness of the legal costs.

JUDGE TILDESLEY OBE

RIGHTS OF APPEAL

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