9.478

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AY/LAC/2013/0018** **LON/00AY/LLC/2013/0001**
Property	:	**Flat B34 Chaucer Road. London SE24 0NU**
Applicant	:	**Mrs Joanne Clare Elieli** **Mr Boaz Junior Lake Elieli**
Representative	:	**In Person**
Respondent	:	**Gandercliff Limited**
Representative	:	**Systech Solicitors**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**S Carrott LLB** **Mr T W Sennett MA FCIEH**
Date and venue of Hearing	:	**4 September 2013** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**15 October 2013**

DECISION

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Decisions of the tribunal

(1) The tribunal determines that the costs of £9,555.60 are unreasonable and that the Applicants are not liable to pay any costs to the Respondent.

(2) The Tribunal dismisses the Applicants' application for penal costs.

(3) The tribunal determines that the Respondent shall pay to the Applicants the sum of £440 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicants.

The application

1. The Applicants, Mr and Mrs Elieli seek a determination under Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of administration charges payable by the Applicants and penal costs pursuant to paragraph 10 of Schedule 12 to the Act.

The hearing

2. The Applicants appeared in person and although Mr Buckingham did not attend the hearing, the Respondent was represented by Counsel, Mr Fain.

3. Also in attendance was the Respondent's Solicitor who gave evidence at the hearing.

4. Immediately prior to the hearing the Respondent handed in further documents, namely outline submissions and authorities. The Applicant also handed in documents which were inserted into the trial bundle.

The background

5. The present dispute arose from building works, which were carried out to 34 Chaucer Road by the Applicants. The Applicants maintained that they received the consent of the landlord from a Mr Kim Buckingham who is both a director of the managing agents, Town Plot Limited and the landlord company.

6. Mr Buckingham denied having given consent to carry out the building works and so on 31 January 2013 the landlord applied to this Tribunal for a determination under section 168(4) of the 2002 Act that the Applicants were in breach of covenant.

7. That application was later withdrawn at the substantive hearing of that application following agreement by the Applicants to pay a licence fee for the works which they had carried out. Counsel attended that hearing on behalf of the Respondent. Mr Buckingham did not attend and indeed has never attended any of the hearings in this matter.

8. Following that hearing, the Respondent demanded £9,555.60 by way of costs arising from the 168(4) application.

9. The Respondent issued a further application under section 168(4) of the 2002 Act on the grounds that the Applicant had failed to pay the administration charge of £9,555.60. The Applicants then issued an application under section 20C of the Landlord and Tenant Act 1985 for the limitation of the landlord's costs and for penal costs.

10. At an oral pre-trial review held on 13 June 2013, the procedural Chairman was of the view that the landlord's application under section 168(4) and the Applicants' application under section 20C were both misconceived.

11. The order of the Tribunal made on that day records that the Respondent's Solicitor disagreed with the Tribunal on its analysis of the application and that the Applicants whilst accepting that their section 20C application was not the correct application to bring at this time did not wish to withdraw their application at that stage.

12. A further hearing was therefore set for 17 July 2013 so that the parties could consider their respective positions and the Tribunal could decide what further orders if any ought to be made in this matter.

13. Although both parties were advised of that hearing date, the Respondent nevertheless issued a claim form in the County Court claiming the administration costs of £9550.60 together with interest, court fee of £245.00 and Solicitor's costs of £100.00.

14. Thereafter the Applicants issued their application under Schedule 11 to the 2002 Act.

15. The hearing of 17 July 2013 came before the present Tribunal. The Respondent landlord had by that time withdrawn its application and the Solicitors had advised the Tribunal that they did not intend to appear but urged the Tribunal not to accept jurisdiction of Applicants' latest application as proceedings had been issued in the County Court which was now seized of the matter.

16. As we explained in our directions, we took the view that it would be disproportionate to allow one or more of the parties to pursue satellite litigation in the county court when the subject matter of claim was said

to be the very same administration charges/legal costs which the Respondent had incurred in connection with proceedings before us.

17. The Applicants agreed to withdraw their section 20C application and proceed with the two applications, which are the subject matter of this application.

18. In particular we ordered at paragraph 9 of our directions that 'witnesses who have made witness statements of fact are expected to attend at the hearing to be cross examined unless the other party has agreed to their statement'.

The issues/Evidence

19. At the start of the hearing the parties and the Tribunal identified the relevant issues for determination as follows:

    (i) Whether the Respondent had given consent to the works of alternation carried out by the Applicants;

    (ii) If the Respondent had not given consent to the works of alteration, whether the costs of £9555.60 were reasonable;

    (iii) Whether the Applicants were entitled to penal costs and/or reimbursement of fees.

20. We heard oral evidence from Mr and Mrs Elieli and from Mr Ashton Doherty, the Respondent's Solicitor. As stated above Mr Buckingham did not attend the hearing. The Respondent's solicitors applied for a postponement of the hearing, some four weeks after that date had been notified to the parties. However Mr Buckingham's dates for availability were such that it meant that this matter could not have been disposed of expeditiously. A different procedural Chairman therefore refused the application for a postponement. No further application for a postponement was made at the hearing.

21. Mr Elieli, gave evidence first. He confirmed the contents of his written witness statement dated 30 July 2013. In that statement he set out the chronology of events and referred to various emails between Mr Buckingham and also telephone conversations. We set out the chronology of events at paragraphs 44 onwards when giving reasons for our decision.

22. He told us that he was a member of the Institute of Managers, and held a degree in English Literature and Linguistics and that he was currently employed in a management role with Metropolitan Support Trust.

23. He was cross examined by Mr Fain about the chronology of events and in particular whether he had told Mr Buckingham about replacing not only the windows in the flat but two windows in the common parts. It was put to him that he had not informed Mr Buckingham about the windows in the common parts. Mr Elieli confirmed that Mr Buckingham was aware that the windows in the common parts, two in number, were being replaced and that Mr Buckingham was also aware of the planning application which had been made to the London Borough of Lambeth and so knew that the windows to common parts were going to be replaced.

24. It was also put to Mr Elieli that the consent was conditional upon paying the licence fee, to which Mr Ellieli agreed. He also agreed that he had told the landlord that the licence fee would be paid in the new year which the parties all agreed to mean before the first quarter date.

25. Mr Elieli was also cross-examined as to his obligations under certain clauses of the lease.

26. However Mr Elieli also told the Tribunal that he had not received an invoice or demand from the landlord or indeed a receipt and a copy of the licence after the payment had been made.

27. Mrs Elieli who is a newly qualified Solicitor and works for a prestigious city firm, confirmed the contents of her witness statement dated 30 July 2013. That witness statement likewise set out the chronology of events and in particular her discussions and email correspondence with Mr Buckingham.

28. She was cross examined by Mr Fain and it was put to her that the permission given by the landlord was conditional on payment of the licence fee and that the licence fee ought to have paid the new year. Her response to that line of cross examination was to point out the email correspondence where the landlord had written to her asserting that she was in breach of the lease but gave no reasons why and pointed out that she had asked Mr Buckingham in two emails for the reasons why it was alleged that the Applicants were in breach but received no reply. She said that on 31 January 2013 the landlord issued the first section 168(4) application and although that application sought to give particulars of the breach for the first time, there was no substance to the allegation because Mr Buckingham had given his consent.

29. She also explained that the reason why the licence fee was not paid was because by 31 January 2013 the landlord had issued the section 184(4) application. It was only at the substantive hearing of that application, the Applicants having agreed previously to make payment, that counsel who appeared for the Respondent on that date (not Mr Fain) agreed to compromise the matter on payment of the licence fee of £840.00.

30. She said that she objected to the landlord's costs because they were not reasonably incurred because the landlord had previously given consent to the works and the licence fee was agreed to be payable after the works and in the new year.

31. In answers to questions by the Tribunal she stated that she had not received an invoice from the landlord for the licence fee or any request for payment. Even after the licence fee was paid she did not receive a receipt or the licence itself.

32. She accepted that even as a Grade C fee earner at a city firm, her charges were commensurate to that of Mr Doherty who is Grade A fee earner. She objected however to the fact that all of the work was carried out by a Grade A fee earner and she also objected to Counsel's fee (not that of Mr Fain) which was being claimed as a disbursement in the sum of £1750 for the substantive hearing which was listed for some two hours.

33. She did not regard the costs as being proportionate to the sum that was being claimed.

34. Mrs Elieli told the Tribunal that she was claiming penal costs because she incurred considerable expense and both her husband and herself had taken time of work in order to deal with the applications brought by the Respondent. She told the Tribunal that she did not think that Mr Buckingham was deliberately denying consent but that because he owned or managed some 400 properties, she thought that he had genuinely forgotten or overlooked the fact that he had given consent.

35. We heard evidence from Mr Doherty, the Respondent's Solicitor. He told us that he qualified as a Solicitor in 2000 and that he had no assistance in dealing with leasehold matters at his firm and so could not delegate any part of the work. He is a Grade A fee earner.

36. When asked by the Tribunal why he did not send a pre-action letter before issuing the section 168(4) application, he relied upon the letter which was sent previously by Mr Buckingham although that letter did not particularise the breach, he considered that the breach was fairly clear from the application.

37. He also accepted that he did not send a pre-action letter for the second section 168(4) application or for the proceedings in the county court. He relied upon the fact that the proceedings in the county court were under the small claims procedure and so costs were not so much of an issue.

38. He also explained the absence of Mr Buckingham.

39. He was cross-examined by Mrs Ellieli about his charging rates.

40. Although Mr Buckingham did not attend the hearing we read his written witness statement dated 21 March 2013. Mr Buckingham contended that he did not give his consent to the alternations either orally or indeed in writing under the terms of the lease.

Reasons for the tribunal's decision

41. We found that that it was fairly plain on the evidence before us that Mr Buckingham gave consent for the works. Although Mr Buckingham contrary to the directions, did not attend the hearing we had regard to the contents of his witness statement. However we attached little weight to that witness statement not because Mr Buckingham did not attend the hearing but because of the inconsistencies with the documentary material before us and with the evidence of the Applicants themselves.

42. We found both Applicants to be most impressive witnesses. They were two young professionals who did their utmost to assist the Tribunal even when it was to their detriment. By way of example, Mr Elieli was prepared to admit that the agreement was conditional on payment of the licence fee because that was his genuine understanding, even though on a proper analysis of the agreement reached between the parties that was clearly not the case. Likewise Mrs Elieli even though it was detrimental to her application for penal costs voluntarily told the Tribunal that she did not believe that the landlord's actions were in any way deliberate and that she thought he had simply forgotten that he had given consent because he managed up to 400 properties.

43. We therefore accepted the Applicants evidence in its entirety as to the chronology of events and found as follows – The Applicants acquired their leasehold interest of the subject property on 25 March 2012. The property was in a bad state of repair with faulty electrics, crumbling plasterwork, inefficient heating and leaking windows. They wanted to carry out building works including upgrading the windows before they moved into the property and therefore wrote to the managing agents on 4 April 2012 requesting permission to update and renovate the premises. In response they were told to contact the landlord by telephone.

44. The Applicants duly spoke to Mr Buckingham by telephone and were told that they needed to pay the sum of £400 in order to obtain consent to carry out the works. Mr Elieli followed up this telephone call with an email dated 10 April to which confirmed the discussion between the parties.

45. The £400.00 was duly paid and it was agreed between the parties that a licence would be granted following the completion of the works: see email dated 11 April 2012 from the managing agents to the Applicants.

46. Planning permission was required to carry out the works of alteration to the windows. In September 2012 the plans were made available to Mr Buckingham and through his subsequent discussions and emails to the Applicants he was plainly aware of the windows which would be the subject of alteration, including two windows to the common parts and the windows in the subject property.

47. Approval for the alterations was obtained on 11 December 2012. Works commenced on 18 December 2012 and upon completion of the works the Applicants notified Mr Buckingham that the works were complete.

48. It was agreed between the parties that the licence fee would be paid after the completion of works in the New Year.

49. Mr Buckingham then wrote to the Applicants informing them that they were in breach of the terms of their lease. He gave no particulars for the alleged breach and two emails from the Applicant's requesting information received no response.

50. On 31 January 2013 the landlord's issued an application in the Tribunal pursuant to section 168(4) of the 2002 Act for a determination that the Applicants were in breach of covenant. No letter before action was sent to the Applicants before the Respondent issued its application.

51. We find that Mr Buckingham agreed on behalf of the landlord that the licence fee was to be paid after the works were completed and in the New Year. All parties are agreed that that meant by the first quarter date. The Respondent however issued proceedings by 31 January 2013 without so much as even requesting the licence fee.

52. Indeed it was only at the substantive hearing of the first application, which Mr Buckingham did not attend, that the parties discussed the licence fee and Mr and Mrs Elieli duly made payment.

53. We reject Mr Fain's arguments that the Applicants were in breach of the terms of the lease. Whatever the terms of the lease may have said it was quite clear from the conversations and correspondence between the parties that not only was consent given but also that no demand was ever made for the licence fee before the Respondent's application was issued on 31 December 2012.

54. In those circumstances we find that the costs were unreasonable in their entirety.

55. Had we come to the conclusion that consent was not given we would nevertheless have reduced the costs substantionally on account of the Respondent's failure to send a letter before action.

Application for refund of fees and penal costs

56. At the end of the hearing, the Applicants made an application for a refund of the fees that they had paid in respect of the application and hearing[1]. Having heard the submissions from the parties and taking into account the determinations above, the tribunal orders the Respondent to refund the fees of £440 paid by the Applicants within 28 days of the date of this decision.

57. The Applicants were forced to make their applications in order to avoid what would otherwise have been an unjust and unreasonable imposition of costs of £9,555.60.

58. The Applicants also made an application for penal costs in that the conduct of Gandercliff, in its conduct of the litigation, is such as to take the situation away from the norm and that the making of an order is appropriate.

59. The making of an order for penal costs is discretionary upon the tribunal and requires a high standard of proof before making such order.

60. His Honour Judge Huskinson in the **Halliard Property Co. Ltd v Belmont Hall and Elm Court RTM Co. Ltd, LRX/130/2007 and LRA/85/2008** stated - *So far as concerns the meaning of the words "otherwise unreasonably" I conclude that they should be construed ejusdem generis with the words that have gone before. The words are "frivolously, vexatiously, abusively, disruptively, or otherwise unreasonably". The words "otherwise" confirm that for the purpose of paragraph 10 behaviour which was frivolous or vexatious or abusive or disruptive would properly be described as unreasonable behaviour. The words "or otherwise unreasonably" are intended to cover behaviour which merits criticism at a similar level albeit that the behaviour may not fit within the words frivolously, vexatiously, abusively, disruptively....Thus the acid test is whether the behaviour permits a reasonable explanation.*

61. The Applicant brought this case before the Tribunal and must be expected to prosecute it. It is felt that the litigation behaviour complained of must go beyond what is acceptable and, in considering this, there must be a margin of tolerance. The threshold is high. Cost

[1] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

powers should not be used to penalise a party or parties who may be found to have been unsuccessful but have acted in good faith. Although the Tribunal understands the Applicants' concerns and has reservations about the conduct of the Respondent, it has not been persuaded in this particular case that the Respondents conduct has been such as to justify the making of an order for penal costs.

62. In the circumstances of this particular case, the Tribunal does not intend to exercise its discretion under this head and declines to make any order for penal costs.

Name: S Carrott 15 October 2013

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" 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.

(2) The relevant costs are 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.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) 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 provisions 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.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) 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.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) 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,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, 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.

(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to that tribunal;
(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
(c) in the case of proceedings before the Upper Tribunal, to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
  (a) specified in his lease, nor
  (b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration 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.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
  (a) has been agreed or admitted by the tenant,
  (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  (c) has been the subject of determination by a court, or
  (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
  (a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).