



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

Case Reference : BIR/OOCQ/LIS/2012/0102

Property : 9 Hickory Close, Coventry, West Midlands, CV2 2NY

Applicant : Mr Ronan Tyrer

Representative : Mr Tyrer

Respondent : Retirement Care Group Ltd. (1)
OM Property Management No.2 Ltd. (2)

Representative : Mrs M. Khan

Type of Application : An application to determine the liability to pay and reasonableness of service charges under s.27A of the Landlord & Tenant Act 1985 ('the Act') and under s.20C of the Act to determine whether the Respondent's costs of the application could be added to the service charge.

Tribunal Members : I.D. Humphries B.Sc.(Est.Man.) FRICS
P.J. Hawksworth (Lawyer)

Date and Venue of Hearing : 21st October 2013 at the First-Tier Tribunal, Property Chamber, Priory Courts 35 Bull St., Birmingham, with further written submissions and counter submissions made after the Hearing in Spring 2014.

Date of Decision : 9 SEP 2014

FINAL DECISION

Introduction

- 1 The First-tier Tribunal issued its decision on the liability to pay and reasonableness of the disputed service charge items on 29th May 2014 in the form of an Interim Decision but reserved its decision on the s.20C application pending further submissions by the parties.
- 2 Further submissions were received but when the Tribunal met to consider its decision on 26th July 2014 it noted that there were two cases that might be relevant that had not been raised by the parties and wrote to the parties again inviting comment. The cases were:
The Church Commissions v Derdabi [2010] UKUT 380 (LC) LRX/29/2011 and
St.Johns Wood Leases Ltd. v Joann O'Neill [2012] UKUT 374 (LC) LRX/86/2011
- 3 All the parties' submissions and counter submissions have now been received and taken into account in this Final Decision relating to the s.20C application.

Relevant Law

- 4 The relevant statutory provisions are in section 20C of the Landlord & Tenant Act 1985 that provide:

'(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 the 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.

(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'
- 5 The reference to 'leasehold valuation tribunal' has been superseded as jurisdiction has been transferred to the First-tier Tribunal.

Lease

- 6 The first question for the tribunal to consider is whether the lease makes any provision for the landlord's costs to be recovered through the service charge at all, because clearly if there were no provision or any costs were specifically excluded from the tenant's liability then the question of recoverability would be irrelevant. The Tribunal therefore checked the draft lease provided by the parties which contains the following provisions:

Clause 4 requires the tenant to pay 'the service charge';

Schedule 4 (Lessee's covenants) Part II, clause 2 contains a further specific requirement for the tenant to pay the service charge;

Clause 1.33 defines the service charge as including a fair and reasonable proportion of the 'service costs';

Clause 1.34 defines 'service costs' as the proper and reasonable costs described in Schedule 6;

Schedule 5 (Lessor's covenants) clause 14 requires the landlord to 'pay all reasonable legal and other proper costs incurred by the Lessor ... 14.1 in the running and management of the reserved property';

Schedule 6 (Lessor's expenses) clause 1 defines the extent of the landlord's costs as 'All costs expenses and outgoings whatsoever incurred by the Lessor in and about the discharge of the obligations on the part of the Lessor as set out in the Lessor's covenants ...';

Schedule 6 clause 12 includes 'All fees charges expenses and commissions payable to any Solicitor Accountant Surveyor or Architect whom the Lessor may from time to time employ in connection with the management and/or maintenance of the Building ...'

- 7 The question of recoverability was not raised by the parties but having considered the terms of the lease the tribunal finds as a primary issue that the landlord's legal costs incurred in connection with the tenant's application challenging the service charge are capable of being recovered under the terms of the lease, subject to the constraints in s.20C that the tribunal must find the costs 'just and equitable in the circumstances'.

Submissions

8 Applicant's Submission

Mr Tyrer asked the tribunal to grant a s.20C order because he had been successful on more than 25 points in the Tribunal's interim determination, either because they had been conceded by the Respondent at the Hearing or because they had been reduced by the Tribunal. Furthermore, he had brought the application because the Respondent had failed to provide information on the service charge costs despite having been asked to do so on numerous occasions.

9 Respondent's Submission

The Respondent asked for the s.20C order to be refused on the ground that most of the charges disputed by the Applicant had been upheld by the tribunal. Mrs Khan for the Respondent said the total credit to the Applicant resulting from the case was only £174.18 which was considered disproportionate to the time and expense involved, that the Applicant's case was vague and ill defined, that most of the complaint related to increases in service charges and that Mr Tyrer had failed to provide any alternative quotes for the work carried out.

Tribunal Determination

- 10 This was a complicated case involving 91 points in issue. Of these, the Applicant was successful in 28 points where costs were either conceded by the Respondent at the Hearing or reduced by the Tribunal in the subsequent decision. However, the Tribunal equally accept the Respondent's points that the net gain to this particular tenant was only £174.18 and that the cost and time taken in the case could have been less had the Applicant clarified the points in issue and provided alternative quotes.
- 11 Neither party had completely won the case and there were merits on both sides.
- 12 In reaching a 'just and equitable' decision the tribunal are unwilling to make a strict apportionment of the costs based on the reduction as a percentage of total costs because this would require further extensive analysis of the management accounts that would be

disproportionate to the case, for example the cost of some of the items such as the management fees had been submitted on a per flat basis rather than as a total for the whole development making strict apportionment difficult.

- 13 Furthermore, even if such an exercise were carried out it would not reflect the reductions in individual sums (e.g. the cost of repairs in 2011 had been reduced from £9,158 to £5,346) or that some of the costs may not have been challenged had the Respondent provided the information to the Applicant in advance when requested.
- 14 In considering whether to make an order under Section 20C, the Tribunal has an unfettered and wide discretion: see *The Tenants of Langford Court v Doren Ltd* (LRX/37/2000) and *Veena SA v Cheong* (2003 1 E.G.L.R. 175). In exercising that discretion the Tribunal has to have regard to what is just and equitable in all of the circumstances. Thus, it does not necessarily follow that a tenant who fails to achieve any or any significant reduction in the service charge payable also should fail to achieve an order limiting the amount of the landlord's costs recoverable through the service charge. In this respect, see *Maryland Estates Ltd v Patsyenne Lynch and David Wilson* (LRX/57/1999). Regard must also be had to the comments of Judge Rich QC in *Schilling v Canary Riverside* (LRX/26/2005) where he states:
- “weight should be given rather to the degree of success, that is the proportionality between the complaints and the determination, and to the proportionality of the complaint, that is between any reduction achieved and the total of the service charges on the one hand and the costs of the dispute on the other hand”
- 15 Since the decision in *Schilling*, the Upper Tribunal has reconsidered S.20c in *Church Commissioners v Derdabi* and *St John's Wood Leases Limited v O'Neil*. According to the Upper Tribunal (HH Judge Gerald) the starting point is to look at the matters in issue, and to consider whether the tenant has been successful in whole or in part. He considered that in some cases “proportionality”, “conduct” and “circumstances” may be relevant. In respect of proportionality, there may be circumstances where the landlord “should only be prevented from recovering his costs of dealing with successful issues” After *Derdabi*, where a landlord is prevented from recovering any part of his costs through the service charge the tribunal is likely to quantify such prevention as a percentage. We are advised by the Upper Tribunal to adopt a robust broad-brush approach and told that there is no need to request a detailed assessment or analysis of the costs associated with a particular issue. The position stated above in *Derdabi* was re-stated by the Upper Tribunal in the *O'Neil* case.
- 16 Thus, having regard to what is just and equitable in the circumstances of this case and in particular, the undoubted difficulties which Mr Tyrer experienced in communicating with the landlords, which were a major factor in his decision to bring his application before the Tribunal, and further applying the robust, broad-brush approach advocated by the Upper Tribunal, the Tribunal finds that the Respondent should be prevented from recovering 25% of its costs via the service charge and makes a s.20C Order limited to that extent.

Appeal Procedure

- 17 If either party is dissatisfied with this decision an application may be made to this Tribunal for permission to appeal to the Upper Tribunal, Property Chamber (Residential Property). Any such application must be received within 28 days after the decision and accompanying reasons have been sent to the parties.

I.D. Humphries B.Sc.(Est.Man.) FRICS

Date: 9 SEP 2014