10305

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BB/LSC/2014/0117** **LON/00BB/LSC/2014/0119** **LON/00BB/LSC/2014/0120**
Properties	:	**14, 16 and 21 Wall End Court** **London E6 2NW**
Applicant	:	**Global Crown Properties Limited**
Representative	:	**Ms F Shaw, counsel**
Respondents	:	**Iqbal Patel** **Amir Rasool** **Maheswaran Markandu**
Representatives	:	**Mr Rasool appeared in person** **Mr Patel and Mr Markandu did not appear**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Tribunal Judge R Percival** **Ms S Coughlin MCIEH**
Date and venue of hearing	:	**8 September 2014** **10 Alfred Place, London WC1E 7LR**
Date of decision	:	**8 September 2014**

DECISION

© CROWN COPYRIGHT 2014

Decisions of the tribunal

(1) The tribunal refused the applicant's application to postpone the hearing.

(2) The tribunal declined to consent to the applicant withdrawing the application.

(3) The tribunal finds that the service charges claimed in the applications are not payable.

(4) The tribunal finds that the respondent Mr Markandu has incurred costs as a result of the applicant's unreasonable conduct of the proceedings, and orders the applicant to pay Mr Markandu's costs in the sum of £300 plus VAT.

The application

1. The applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service payable by the respondents as set out below.

2. In respect of flat 14, the applicant claims an insurance premium for each year from 13 May 2007 to 12 May 2013 (respectively, £221.91; £212.58; £372.56; £279.64; £306.33 and £318.52). The applicant further claims monthly payments for "service charge on account" from 8 January 2007 to 28 February 2014. Each of these is for £50, except the first (8 to 31 January 2007) which is for £38.49. The totals for each year are 2007 £810.40; 2008 £812.58; 2009 £972.56; 2010 £879.64; 2011 £906.33; 2012 £918.52; 2013 £500; and 2014 £200.

3. In respect of flat 16, the applicant claims an insurance premium of £267.19 for 13 January 2002 to 12 January 2003; and thereafter premiums for the two years beginning 13 May 2003 of £198.53 and £113.75 respectively. There is a claim for a balance brought forward on 1 January 2003 of £396.87. For 2009 to 2013, there are monthly claims for "service charge on account" for £50. In 2014, there are three such monthly claims. The totals for each year are 2002 £267.19; 2003 £595.40; 2004 £113.75; 2009 to 2013, £600 each year; and 2014 £140.

4. In respect of flat 21, the applicant claims insurance premiums for years from 13 May 2003 to 12 May 2013 (respectively, £198.53; £213.61; £217.88; £192.68; £221.92; £221.58; £372.55; £279.65; £306.33; £318.53; and £278.40). In 2003, nine monthly "service charge on account" claims are made, the first of which (1 April to 30 April 2003) is for £33.50 and the remainder for £50. From 2004 to 2013, monthly claims of £50 for "service charge on account" are made. In 2014, there

are two such claims. The totals for each year are 2003 £632.03; 2004 £813.61; 2005 £817.88; 2006 £828.10; 2007 £821.92; 2008 £821.58; 2009 £972.55; 2010 £879.65; 2011 £906.33; 2012 £918.53; 2013 £878.40; and 2014 £100.

5. The relevant legal provisions are set out in the Appendix to this decision.

The history of the application

6. On 27 February 2014, the landlord of the properties made two applications in respect of each flat. The first set of applications were made under section 27A of the Act. The second set were for a determination of breach of covenant under section 168(4) of the Commonhold and Leasehold Reform Act 2002, relating to ground rent and service charges.

7. A case management conference was initially scheduled for 25 March 2014, but was postponed to allow for negotiation between the parties, or at least, between the applicant and Mr Markandu, who was and is represented by solicitors (Trident Law).

8. The case management conference was eventually relisted for 27 May 2014. On 22 May, the applicant sought a postponement, on the basis that "we are in the process of collating further documents to see if we can negotiate a settlement" with Mr Markandu. The application to postpone was refused on the basis that there were two other flats involved, that the matter had already been stayed pending a settlement, and that it was not necessary for Mr Markandu to attend.

9. At the case management conference, held before Tribunal Judge John Hewitt, the applicant was represented by counsel, but the respondents did not appear. Judge Hewitt struck out the applications under the 2002 Act.

10. Judge Hewitt's directions in respect of the remaining applications were clearly informed by the contents of the leases, so it is appropriate to explain the somewhat unusual service charge provisions at this point.

11. The leases provide for each of the leaseholders to be liable for one twenty-first of the landlord's expenditure on maintenance, repairs and insurance. Clause 2(2) of the leases provide for the leaseholders to pay, on 25 December each year, a sum estimated by the lessor to be the average annual liability to be incurred in next three years. That sum is to certified by the landlord's managing agent prior to the 25 December in every third year. In default of a certificate being issued, the amount payable is the same as in the previous three year period. The landlord is then required, for each three year period, to render an account to the

leaseholder. Provision is made for over- and under-payments to be repaid and demanded.

12. Judge Hewitt went on to make directions as follows:

"20. The applicant shall by 5pm Friday 27 June 2014:

20.1 File with the tribunal complete and legible copies of the lease of flats 14, 16; and

20.2 Serve on each respondent a supplemental statement of case which shall deal with the following matters;

20.2.1 Set out the date on which the applicant acquired the freehold reversion;

20.2.2 If that date was after January 2001, set out all facts and matters relied upon in support of its case that it is entitled to recover service charges accruing due prior to the date it became the landlord;

20.2.3 Attach copies of the certificates (if any) relied upon to support the claims that the respondents were obliged to make on account payments;

20.2.4 Attach the three yearly accounts provided for in the leases; if they are not available give a full account of how payments on account and balancing debits/credits are reconciled;

20.2.5 Explain how the alleged obligation on the respondents to make monthly on account payments has arisen and the legal basis for it;

20.2.6 Attach copies of each demand given to each respondent for each sum alleged to be due and payable;

20.2.7 Attach any notice given to a respondent pursuant to section 48 Landlord and Tenant Act 1987."

13. The directions went on to make provision for the respondents to provide a statement of case in answer by 18 July 2014, and a statement of case in reply by the applicant by 1 August. The hearing date was set as 8 September 2014.

14. The directions, as is standard practice, started with a clear statement that "these directions are formal orders and must be complied with", and that "failure to comply with directions could result in serious detriment to the defaulting party, eg the tribunal may refuse to hear all or part of that party's case and orders may be made for them to reimburse costs or fees thrown away as a result of the default". The end of the directions document contained a warning that "in the case of the applicant non-compliance could result in dismissal of the application in accordance with rules 8 and/or 9 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013".

15. Direction 20.1 was complied with late, on 11 August 2014. The remainder of the directions were not complied with.

16. On 1 September, 2014, the applicant wrote to the tribunal, requesting that the hearing be postponed. The letter stated that "We have been collating relevant information in support of our client's statement of case which has taken far greater time than originally anticipated." The request was for a postponement of four weeks.

17. The request was refused in a letter dated 4 September on the basis that the case management conference had been in April [sic]; that there was insufficient time for the respondents in respect of flats 14 and 16 to give their views, and the letter requesting a postponement was not copied to them (itself contrary to the directions, which required all letters sent to the tribunal to be copied to the respondents). The letter communicating the tribunal's decision made it clear that, while the application to postpone could be renewed at the hearing, the applicant must nonetheless be prepared to proceed.

The hearing

18. The Applicant was represented by Ms F Shaw of counsel. Mr Rasool appeared in person, supported by a friend.

19. Ms Shaw renewed the application for a postponement. She submitted that it was in the interests of justice that the case should proceed when all parties were ready and that a postponement would not prejudice the respondents. She told the tribunal that Mr Rasool had indicated his agreement to a postponement, and that Mr Patel had not been engaged in the process throughout. Ms Shaw said that Mr Markandu solicitor's, while not formally consenting to a postponement, were principally

concerned about their costs, which were £300 plus VAT, and that the applicants were content to pay those costs.

20. Ms Shaw made it clear that her instructions were limited to making the application to postpone, and that she had very little information about the applications available to her. The tribunal adjourned to allow her to ascertain what the difficulties were in procuring the documents, and whether a short postponement would prove to be of any assistance. Despite her best efforts, she was unable to do so.

21. Ms Shaw accepted that a postponement for four weeks was unrealistic. The directions made by Judge Hewitt allowed three weeks for the respondents to reply to the applicant's supplemental statement of case, and a further two weeks thereafter for the applicant to reply. She agreed that it would not be fair to curtail the time allowed for the preparation of the respondents' case statement. She could not assist with an estimate of how long it would take the applicant to serve its initial supplemental statement of case. She accordingly amended the application for a postponement of between six weeks and three months.

22. Ms Shaw further argued that, if the application to postpone was refused, she was instructed to withdraw the application and the applicant would thereafter re-issue proceedings (or apply for the case to be reinstated under rule 22(5) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the Rules")). This course would be less convenient that a postponement, she argued.

23. Mr Rasool, with the assistance of his friend, told the tribunal that he thought that the applicant should have got the documents in order by now, and that he did not trust them to do so in the period being requested.

The decision on the application to postpone

24. The tribunal considered that the applicant had treated the tribunal's directions with a disregard amounting to contempt. The applicant knew on 27 May that the hearing was scheduled for 8 September. The applicant must have known no later than 27 June that it would not be able to comply with the direction to serve its supplemental case statement – the key document to establish its case on which the rest of the process hinged – in accordance with the directions. Nevertheless, the applicant failed to communicate with the tribunal in any way until ten weeks later; and that in the form of an application to postpone the hearing date. If a party knows it will fail to comply with a direction, it has the option of asking the tribunal to vary the direction or to issue further or different directions. The applicant in this case essentially sabotaged the process at the outset, and then sought to rely on that act to justify a postponement of the hearing.

25. The original application, for a postponement of four weeks, was clearly unrealistic, as must have been apparent to the applicant. It naturally arouses the suspicion that the applicant was being guided by what it thought the tribunal might accept – a short postponement – rather than a longer, but more realistic, postponement to allow the process to take its course. Ms Shaw wisely amended the application to a longer period, and it is that more realistic submission on which the tribunal ruled. However, it adds to the impression that the applicant has been treating the tribunal with contempt.

26. The letter refusing the paper application for a postponement made it clear that the applicant should be prepared to proceed in the event that the application to postpone was not successful. It became clear during the hearing that this was another requirement of the tribunal which the applicant had disregarded. Ms Shaw was not instructed to proceed to the substantive application.

27. Ms Shaw argued that the respondents would not be prejudiced by further delay. It is true that Mr Rasool was not able to identify any specific disadvantage he would suffer by the postponement of the hearing. That may or may not be true of the other two respondents. Nevertheless, the tribunal itself has already devoted appropriate resources to the application, and any postponement would add to the resources already co-opted by the applicant's disregard of the tribunal's directions.

28. The tribunal accordingly refused the application to postpone the hearing.

The decision on the application to withdraw

29. Following the refusal of the application to postpone, Ms Shaw applied to withdraw the applications under rule 22 of the Rules. Rule 22(3) provides that withdrawal requires the consent of the tribunal. Ms Shaw made it clear that if the case were withdrawn, it was the applicant's intention to revive it. In her submission, the same arguments as applied to the application to postpone applied to the application for consent to withdraw.

30. The tribunal concluded that consenting to the withdrawal of the applications in these circumstances would effectively undermine the tribunal's decision in respect of postponement. It would occasion the same mischief of allowing the applicant to co-opt further the resources of the tribunal by means of its own disregard of the rules. The applicant had been clearly told in the tribunal's letter of 4 September that it should be in a position to proceed.

31. The tribunal therefore declined to consent to the withdrawal of the applications.

The substantive applications

32. In the light of her instructions and the very limited nature of the information at her disposal, Ms Shaw was not able to act for the applicant in respect of the substantive application.

33. There was therefore no evidence available from the applicant to demonstrate its case.

34. The tribunal accordingly finds for the respondents. The tribunals find that the amounts claimed as set out in paragraphs 2 to 4 are not payable as service charge to the applicant.

35. In the circumstances we did not ask Mr Rasool to adduce evidence or address us.

36. It is worth noting, as anticipated in the directions, that, had the case proceeded as it should have, there would have been real legal and factual issues for the tribunal to consider. In particular, there is an apparent conflict between what the leases require of the landlord to claim service charges from the leaseholders and the way in which the applicant put its claim in the initial applications. At the directions hearing, Judge Hewitt also identified as an issue the time at which the current landlord acquired the reversion and whether the leaseholders were liable to it in respect of earlier years.

Costs

37. Before withdrawing, we asked Ms Shaw if she wished to make any submissions in respect of costs, in particular the costs of Mr Markandu which the applicant had undertaken to meet were a postponement to be granted.

38. Ms Shaw submitted that that agreement was posited on a successful application for a postponement, and that the usual rule should apply and all parties bear their own costs.

39. The tribunal considers that the agreement between the solicitors in the event of a postponement is indeed irrelevant. Nevertheless, the tribunal considers that these same costs only arose because the applicant acted unreasonably in its conduct of the proceedings. The tribunal accordingly orders the applicant to pay Mr Markandu's costs in the sum of £300 plus VAT.

Section 20C of the 1985 Act

40. The lease includes a provision allowing the landlord to recover the costs incurred in or in contemplation of any proceedings under section 146 of the Law of Property Act 1925, which may cover the costs of the current applications.

41. Due to the unusual course of these applications, there was no real opportunity for the tenants to make an application that such costs should not be recovered from them as service charges under section 20C of the 1985 Act. We accordingly make no order. The tenants may apply to the tribunal for such an order now (section 20C(2)(b)), or, if an attempt is made to so recover the costs, on an application under section 27A.

Name: Tribunal Judge R Percival **Date:** 8 September 2014

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 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.