

10402



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

Case Reference : LON/00BK/LSC/2014/0017

Property : 12B & 12C Denholme Road, London
W9 3HX

Applicant : Mr A Stylianou (1)
Mr R Gay (2)

Representative : Ewan & Co Solicitors

Respondent : Marmion Securities

Representative : Parkgate-Aspen Limited (managing
agents)

Type of Application : Costs under Rule 13 Tribunal
Procedure (First-Tier Tribunal)
(Property Chamber) Rules 2013

Tribunal Members : Mr Jeremy Donegan – Tribunal
Judge
Mr Philip Tobin FRICS – Valuer
Member

**Date and venue of
Paper Determination** : 18 November 2014
10 Alfred Place, London WC1E 7LR

Date of Decision : 18 November 2014

DECISION

Decision of the tribunal

- (1) The tribunal refuses the application for an order in respect of costs under Rule 13(1)(b)(ii) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (“the 2013 Rules”).
- (2) The tribunal does not make an order for reimbursement of fees under Rule 13(2) of the 2013 Rules.

The applications and background

1. On 09 January 2014 the tribunal received two applications under section 27A of the Landlord and Tenant Act 1985 (“the 1985 Act”), relating to service charges at 12 Denholme Road, London W9 3HX (“the Building”) for 2013.
2. Directions were issued by the tribunal following a case management hearing on 04 February 2014. These identified that the issue to be determined was the reasonableness and payability of service charges demanded in connection with estimated costs for major works. The applications were listed for a final hearing on 25 April 2014.
3. On 17 March 2014 the Respondent’s managing agents (“PAL”) wrote to the tribunal, advising that they had commenced a new consultation exercise for the major works under section 20 of the 1985 Act. The letter requested a stay of proceedings pending the outcome of the new consultation. The Applicants’ solicitors (“EC”) consented to the stay in a letter to the tribunal dated 28 March 2014. The tribunal wrote to the parties on 02 April 2014, advising that the hearing on 25 April had been vacated and requesting an update by 30 April.
4. PA provided the tribunal with an update in a letter dated 30 April 2014. On 23 July 2014 the tribunal wrote to the parties, asking if the case could be withdrawn. PAL responded on 12 August 2014, stating that they were waiting to hear from EC. There was no response from EC
5. On 17 October 2014 PAL wrote to the tribunal stating that the Respondent did not wish to proceed with the case. On 22 October 2014 the tribunal issued a notice that it was minded to strike out the applications, pursuant to Rule 9(3)(d) of the Tribunal Procedure (First-Tier Tribunal)(Property Chamber) Rules 2013 (“the 2013 Rules”).
6. On 28 October 2014 EC wrote to the tribunal, withdrawing the applications and stating:

“However as a result of the Respondents failure in the first instant concerning the Consultation Process our Applicants require an Order for their fees to be paid in full by the Respondents”.

7. The tribunal consented to the withdrawal of the applications on 28 October 2014 and issued further directions, upon the basis that the Applicants were seeking reimbursement of fees pursuant to Rule 13(2) of the 2013 Rules.
8. On 06 November 2014 the tribunal received a costs schedule from EC together with a supporting witness statement and bundle of documents from their senior partner, Mr Charles Ewan dated 05 October 2013. It is apparent from these documents that the Applicants are seeking a costs order under Rule 13(1)(b) of the 2013 Rules. The total sum claimed in the costs schedule is £3,442 including tribunal fees and VAT.
9. On 12 November 2014 PAL wrote to EC, setting out its grounds for opposing the application for costs. A copy of the letter was provided to the tribunal. The Respondent did not file a formal statement in response, in accordance with the directions dated 28 October 2014.
10. The tribunal has treated the documents received on 06 November 2014, as an application for costs under Rule 13(1)(b) and has determined the application on paper, based on the documents filed by EC and the letter from PAL dated 12 November 2014.
11. The relevant legal provisions are set out in the Appendix to this decision.

Submissions

12. At paragraph 9 of his statement, Mr Ewan refers to *“..wasted costs incurred by a party due to the improper, unreasonable or negligent acts of omissions on the part of the Representative for the parties or where a person has acted unreasonably in defending Proceedings”*. Earlier in his statement he refers to a long running dispute regarding the proposed major works at the Building and suggests that there had been a lack of proper consultation under section 20 of the 1985 Act.
13. Although Mr Ewan has referred to *“wasted costs”*, it appears to the tribunal that the Applicants are seeking to recover their costs under Rule 13(1)(b)(ii) rather than under section 29(4) of the Tribunals, Courts and Enforcement Act 2007.
14. Mr Ewan contends that the Respondent has acted unreasonably in defending and conducting these proceedings. He refers to attempts made by the Applicants and his firm to resolve the service charge

dispute, prior to the inception of these proceedings. Mr Ewan suggests that the tribunal application was necessary due to PAL's threat to commence Court proceedings against the Applicants and that it was only recently that the Respondent started to take the Applicants' complaints seriously.

15. At paragraph 5 of his statement, Mr Ewan refers to the Respondent's failure to comply with the directions issued on 04 February 2014. It appears that the Respondent did not serve an itemised breakdown of the estimated cost of the major works in accordance with paragraph 5 of the directions.
16. PAL reject the suggestion that the Respondent failed to comply with section 20. In its letter of 12 November 2014 it provided details of the consultation procedure undertaken in 2013. PAL also explained that it offered to re-start the consultation procedure in order to resolve the dispute, given that the major works had not commenced.
17. Having studied the submissions from the parties and considered all of the documents provided, the tribunal has made the following determination.

The tribunal's decision

18. The application for an order for costs is refused. For the avoidance of doubt the tribunal does not make an order for reimbursement of fees under Rule 13(2).

Reasons for the tribunal's decision

19. In order to obtain an order for costs under Rule 13(b)(ii) the Applicants must establish that the Respondent acted unreasonably in defending or conducting these proceedings. Establishing unreasonable behaviour is a high threshold.
20. The Applicants have withdrawn the applications under section 27A of the 1985 Act. The tribunal is not in a position to assess whether the applications were necessitated by any unreasonable behaviour on the part of the Respondents or PAL. Further it is not in a position to determine whether the consultation exercise in 2013 complied with section 20 or whether the 2013 service charges are payable by the Applicants. It follows that the tribunal is not in a position to comment upon the conduct of the parties prior to the inception of these proceedings.
21. The proceedings were stayed for settlement discussions shortly after the original directions were issued on 04 February 2014. The

Respondent did not unreasonably defend the proceedings, as no “defence” was ever filed.

22. It appears that the Respondent did not comply with paragraph 5 of the directions, due to an oversight on the part of PAL. A failure to comply with directions can amount to unreasonable conduct, particularly if the failure is wilful or there is repeated flouting of the directions. In this case it appears that the non-compliance was due to an innocent mistake on the part of PAL. Further the Applicants have not provided details of any specific costs that it has incurred as a result of this non-compliance. It is also worth pointing out that the Applicants did not raise the non-compliance with the tribunal at the time. They could have sought orders under Rules 8 or 9 of 2013 Rules but did not do so.
23. The Applicants have not established that the Respondent acted unreasonably in defending or conducting the proceedings. Further the Applicants have not established any grounds for seeking reimbursement of the fees paid to the tribunal.

Name: Tribunal Judge Donegan **Date:** 18 November 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 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.]

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Rule 9(3)

The Tribunal may strike out the whole or part of the proceedings or case if the Tribunal –

- (a) the applicant has failed to comply with a direction which stated that a failure by the applicant to comply with the direction could lead to the striking out of the proceedings or case or that part of it;
- (b) the applicant has failed to co-operate with the Tribunal such that the Tribunal cannot deal with the proceedings fairly or justly;
- (c) the proceedings or case are between the same parties and arise out of facts which are similar or substantially the same as those contained in a proceedings or case which has been decided by the Tribunal;
- (d) the Tribunal considers the proceedings or case (or part of them), or the manner in which they are being conducted, to be frivolous or vexatious or otherwise an abuse of the process of the Tribunal; or

- (e) The Tribunal considers there is no reasonable prospect of the applicant's proceedings or case, or part of it, succeeding.

Rule 13 (1)

The Tribunal may make an order in respect of costs only –

- (a) under section 29 (4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
- (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in –
 - (i) an agricultural and land drainage case,
 - (ii) a residential property case, or
 - (iii) a leasehold case; or
- (c) in a land registration case.