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

Case Reference : **BIR/00FN/LSC/2013/0003**

Property : **Apartment 202, The Exchange, 5 Lee Street, Leicester LE1 3AH**

Applicants : **Andrew Trevor Davies and Katherine Louise Davies**

Respondent : **Wharf Street South Developments Limited**

Type of Application : **For an Order under section 20C of the Act**

Tribunal Members : **Judge W J Martin
J E Ravenhill F.R.I.C.S**

Date of Decision : **29 JAN 2014**

DECISION

Decision: The Tribunal grants an Order under section 20C that two thirds of the Respondent's costs before the Tribunal are not to be regarded as relevant costs to be taken into account in determining any service charge payable by the Applicants.

Reasons For the Tribunal's Decision

Preliminary

- 1 This Decision is supplemental to the Tribunal's Decision ('the section 27A Decision') dated 16th December 2013 in respect of the Applicants' Application under section 27A of the Act relating to Apartment 202, the Exchange, 5 Lee Street, Leicester, LE13AH.
- 2 In paragraph 71 of the section 27A Decision the Tribunal invited written submissions from the parties in respect of the Application which had been made by the Applicants in the original Application, but upon which no submissions had been made prior to or during the Hearing of the original Application.

Submissions

- 3 The Applicants by letter dated 21st December 2013 submitted that they had no desire to bring the Application to the Tribunal, but felt that it was the only way they would be able to receive some answers to the questions about the communal utility supplies at The Exchange. The Apartment is let to a shorthold tenant, and as responsible landlords the Applicants felt compelled to ascertain and challenge what appeared to be high costs, particularly the heating.
- 4 It was not until the Tribunal process elicited formal submissions from the Respondent that the Applicants were fully aware that the maintenance costs for the infrastructure were included in the unit charges. Had the Applicants known this they could have negotiated a different system rather than applying to the Tribunal. The Respondent's legal costs should not, therefore, be passed on through the service charge as it is the Respondent's lack of transparency over the charges which left the Applicants no other choice.
- 5 Because of the lack of transparency, the Applicants were obliged to obtain an expert report from Mr Mace. He has charged £572 and on top of this the Applicants have paid £250 for the Tribunal Application and Hearing fees. The Tribunal is, for the above reasons, requested to grant the Applicants application for an order under section 20C of the Act.
- 6 The Respondent's submissions were made in a letter from Moss and Coleman, its solicitors, dated 3rd January 2014. The Applicants challenged the sums that they had been charged for utilities. The Tribunal determined that of the four utility charges, three of them, i.e. those for cold water, used water and hot water, were all reasonable.

- 7 The Tribunal's concerns related to the meter, and it substituted its own figures. It is suggested that the Tribunal has shown some generosity to the Applicants by making no VAT adjustment for the erroneous rate used by the Applicants, which would have increased the 'admitted' amount of £488.73 to £545.51 (based on a per annum calculation, when the determination is for a 57 week period).
- 8 The Applicants have been unsuccessful in their challenges to three of the utilities. However, with regard to the heating charge, whilst it could be said that the Applicants were successful, it is not reasonable to penalise the landlord by making a decision in the tenant's favour under section 20C, because of the suggested generosity to the Applicants by not increasing the charge to take account of its findings that Barkers (the Applicant's letting agents) probably left the heating on 24/7.
- 9 The Respondent therefore submits that the Tribunal should refuse the section 20C Application. Alternatively, if it does make an order, it should restrict it to 25% of the Landlord's costs, because of the success of the Landlord in respect of three of the utilities.

The Tribunal's Determination

- 10 Section 20 C of the Act provides as follows:

'20C Limitation of service charges: costs of proceedings

- (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 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.*
- (2) *The application shall be made....*
 - (b) *in the case of proceedings before a leasehold valuation tribunal or the First-tier Tribunal to the tribunal in which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal....*
 - (ba) *in the case of proceedings before the First-tier Tribunal, to the tribunal*
- (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'*

- 11 The Tribunal considers that, following the authorities that have given guidance upon the exercise of the discretion, the overriding principal is what is just and equitable in the circumstances of the case. However, the

Tribunal should, in a service charge case, consider not only whether the Applicants have obtained a reduction, but should also give weight to the degree of success, i.e. the proportionality between the complaint and the determination. The Tribunal also considers that in determining what is just and equitable, it is legitimate to consider the conduct of the parties.

- 12 In the present case, the Tribunal notes that Moss and Coleman submit that, whilst it can be said that the Applicants were successful in respect of the heating charges, the Tribunal should not exercise its discretion in favour of the Applicants, because of the alleged 'generosity' towards the Applicants in the way it applied its findings. The Tribunal rejects this approach as an attempt to obtain a review of the decision itself, not the manner in which the Tribunal should exercise its discretion.
- 13 Moss and Coleman also say that, if the Tribunal is mindful to make an order, it should bear in mind that the Applicants have only been successful in respect of one of the four utility charges under challenge, and thus restrict the order to one quarter of the Respondent's costs. The Tribunal, whilst recognising that it should consider the proportionality between the complaint and the determination should also bear in mind the values attributable to the various utility charges, rather than as equal components. The Heating charge (£763.40) is by far and away the largest of the four charges (the remaining three total £267.45), and clearly the main reason for the Applicants' decision to make the Application in the first place.
- 14 The Applicants' submissions are broadly that the order should be granted, because it was only as a result of them making the 27A Application that the Respondent effectively provided answers to questions they had posed on a regular basis beforehand.
- 15 The Tribunal finds that in the circumstances of this case it is just and equitable that the 20C order is granted as to two thirds of the Respondent's relevant costs. The Applicants have been successful in the major component of the utility charges, and whilst the charges in respect of the other utilities have been confirmed as reasonable by the Tribunal, it is only following the evidence of the Applicants' expert, Mr Mace, that the Tribunal was in a position to make the determinations in respect of them. The Applicants have paid for Mr Mace's report amounting to £572 and have also paid the Application and Hearing fees amounting to £250 in total. The Applicants have been partially successful and the Tribunal does not consider it reasonable that, in addition to these charges, the Applicants should have to pay through the service charge a share of all, or a large part, of the Respondent's costs in bringing the proceedings.
- 16 However, the Applicants were not successful in obtaining a reduction in the utility costs for cold water, used water and hot water, and the Tribunal considers that it should give weight to this factor. It is the Tribunal's view, therefore, taking all matters into consideration that it is just and equitable that the Respondent should be able to recover one

third of its relevant costs in connection with the Tribunal proceedings through the service charges it will levy in future at The Exchange.

- 17 The Tribunal therefore orders that two thirds of the Respondent's relevant costs in connection with are not to be considered as relevant costs in determining the amount of service charge payable by the Applicants.
- 18 If either party is dissatisfied with this decision they may apply for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be made within 28 days of this decision (Rule 52 (2)) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

29 JAN 2014

Judge W. J. Martin – Chairman