10282

FIRST - TIER TRIBUNAL

PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/23UB/LDC/2014/0017.**
Property	**:**	**90A Suffolk Road, Cheltenham, GL50 2SZ.**
Applicant	**:**	**Mr. Mark Steven Gould.**
Representative	**:**	**Charles Russell LLP, Solicitors.**
Respondents	**:**	**Mr. Paul David Sutor and Mrs. Caroline Ann Sutor.**
Representative	**:**	**In person.**
Type of Application	**:**	**Determination of reasonableness of service charges, s27A Landlord and Tenant Act 1985 (as amended); Dispensation with Consultation, s20ZA Landlord and Tenant Act 1985 (as amended); and Determination of breach of covenant, S168(4) Commonhold and Leasehold Reform Act 2002.**
Tribunal Members	**:**	**Judge J G Orme (Chairman) Judge W M S Tildesley OBE Mr. I R Perry FRICS.**
Date and Venue of Hearing	**:**	**12 September 2014. Bath Law Courts.**
Date of Decision	**:**	**19 September 2014.**

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Decision

For the reasons set out below, the Tribunal:

1. **Orders the Applicant, Mr. Mark Steven Gould, to pay to the Respondents, Mr. Paul David Sutor and Mrs. Caroline Ann Sutor, their costs incurred in connection with the applications, such costs being assessed in the sum of £1,364.94. That sum is to be paid to the Respondents by 4pm on 17 October 2014. For the avoidance of doubt it is not to be set off against any sum which the Applicant may allege is owed to him by the Respondents.**

2. **In so far as the Applicant has made an application for reimbursement of his fees paid in connection with the applications, the Tribunal makes no such order.**

Reasons

Background

1. The Tribunal issued its decision in connection with the substantive issues raised by the four applications on 8 July 2014. In that decision, the Tribunal indicated that it was minded to make an order for the Applicant to pay the costs incurred by the Respondents in relation to the applications and made directions for the parties to make further written submissions in relation to the issue of costs.

2. The Respondents have made submissions setting out details of their costs. Charles Russell LLP replied on behalf of the Applicant submitting that no order for costs should be made and making submissions on the amount of costs claimed.

3. Neither party requested an oral hearing on the issue of costs. The Tribunal convened on 12 September 2014 to determine the issue of costs.

The Law

4. *Section 29 of the Tribunals, Courts and Enforcement Act 2007* provides that the costs of and incidental to all proceedings in the First-tier Tribunal shall be in the discretion of the tribunal in which the proceedings take place. *Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013/1169)* ("the Tribunal Rules") makes further provision for the award of costs in tribunal proceedings. The tribunal may make an order for costs if a person has acted unreasonably in bringing, defending or conducting proceedings.

5. The full text of the statutory provisions referred to in this section are set out in the appendix to the substantive decision.

Conclusions

6. The question which the Tribunal must consider is whether the Applicant has acted unreasonably in bringing or conducting the applications.

7. The meaning of "*unreasonable*" was considered by the Court of Appeal in the context of wasted costs orders in the case of *Ridehalgh v Horsefield [1994] Ch 205*. At page 237, Sir Thomas Bingham MR said:

   "Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable, simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.

8. The fact that the Tribunal found (at paragraph 45) that Mr. Gould had failed to understand his obligations under the terms of the lease in respect of the service charge does not, of itself, indicate that has acted unreasonably in bringing the applications. Equally, the fact that Mr. Gould failed in nearly all aspects of his applications does not mean that he has acted unreasonably in bringing the applications.

9. Mr. Gould's first application was the application which he made on 29 March 2014 to dispense with the consultation requirements in connection with work which he needed to carry out following the collapse of a single-storey extension at the rear of the property. Mr. Gould may have had good reasons for making that application. He knew that the work was necessary, that there was a degree of urgency and that he wanted to seek a contribution from the Respondents and he believed that he did not have time to carry out the consultation process in full. If the Tribunal was just considering that one application, it may be that it would not now be considering making an order for costs against him.

10. However, when taken in the context of the history of relations between the parties, the Tribunal has concluded that Mr. Gould acted unreasonably by proceeding with that application and making 3 further applications. The Tribunal reached that conclusion having taken into account the following matters:

    a. As recorded in the substantive decision, Mr. Gould demanded that Mr. and Mrs. Sutor pay more money on account of service charges at a time when he had not complied with his obligations under the terms of the lease by not producing final service charge accounts for the years 2012 and 2013. He did that when, as found by the Tribunal at paragraphs 47 to 49, Mr. and Mrs. Sutor were already

in credit. It is also relevant to the background that there had been 2 previous applications to the Tribunal by Mr. Gould to which Mr. and Mrs. Sutor were parties.

b. Between 10 and 27 March 2014, there was correspondence between Davies and Partners, solicitors acting for Mr. and Mrs. Sutor, and Mr. Gould. An examination of that correspondence shows that Mr. and Mrs. Sutor did not accept Mr. Gould's claim for further service charges, that they were aware of their right to apply to the Tribunal to determine the extent of their liability but that they wished to resolve the matter by negotiation or mediation without further proceedings. Although Mr. Gould indicated that he was obtaining legal advice, there is no evidence before the Tribunal that he actually did so. Mr. Gould's position was that he had supplied sufficient information and that he intended to proceed with his application to the Tribunal.

c. Notwithstanding the objection by Mr. and Mrs. Sutor to the claim for further service charges, they made a further payment on account of £3,850.

d. The parties attended a case management hearing on 9 May 2014 to consider the application for dispensation, which, at that time, was the only application before the Tribunal. As recorded at paragraphs 5 and 6 of the directions issued following that hearing, it was Mr. Gould who widened the dispute by seeking dispensation from consultation in relation to further works and by seeking a determination in respect of service charges. Mr. and Mrs. Sutor made it clear at the hearing that they wished to explore the possibility of a settlement as they were in the process of selling their flat and had a prospective purchaser. Mr. Gould knew that Mr. and Mrs. Sutor were under pressure at that stage. Mr. Gould indicated at the hearing that he was not prepared to negotiate or mediate on the service charges and he was told by Judge Tildesley that, in that case, he would have to issue an application for determination of the service charges. Directions were given accordingly.

e. Following the hearing on 9 May, Davies and Partners again wrote to Mr. Gould saying that Mr. and Mrs. Sutor were willing to enter into mediation to resolve the dispute.

f. Although Mr. Gould says that he accepted the offer of mediation, there is no written evidence before the Tribunal to that effect. What is clear is that he chose to pursue his application rather than to pursue a negotiated or mediated settlement.

g. Mr. Gould then compounded the matter by not only issuing the application for determination of the service charge but a further application for dispensation and an application for a determination that there had been a breach of covenant. Mr. Gould says that he

had to issue those applications to comply with the Tribunal's directions but he did not need to do so if he resolved the dispute in a different way. At the end of the day it was his decision to make and pursue those applications.

11. Taking all these matters into account, the Tribunal has concluded that Mr. Gould's conduct in bringing and conducting the applications was oppressive and can only be seen as being designed to harass Mr. and Mrs. Sutor rather than advance the resolution of the dispute. His conduct does not permit of another reasonable explanation. It was unreasonable. Mr. Gould could and should have entered into negotiations with Mr. and Mrs. Sutor to resolve the dispute by other means.

12. The Tribunal's conclusions are supported by an e-mail dated 26 May 2014 sent by Mr. Dickson, the prospective purchaser of the flat, to Mr. and Mrs. Sutor explaining why he had pulled out of the purchase. He said "*my discussions with the freeholder showed that there had been a challenging relationship between you and him. I had very real concerns that this difficulty would continue into my tenure.*"

13. For those reasons the Tribunal has determined to make an order that Mr. Gould should pay the costs incurred by Mr. and Mrs. Sutor in relation to the applications. However, the submissions made by Charles Russell LLP on behalf of Mr. Gould raise a number of other issues which require comment.

14. In the second part of paragraph 1.2.1, it is suggested that Mr. Gould should be entitled to recover, through the service charge, the fee paid to the Tribunal for the service charge application. That demonstrates a misunderstanding of what the Tribunal said at paragraph 82 of its reasons. The Tribunal does not need to make any determination as to whether or not the lease permits Mr. Gould to recover legal costs through the service charge. Whether or not the lease does so allow, the Tribunal has made an order under *section 20C Landlord and Tenant Act 1985* which prevents the recovery of such costs in that manner. That applies to the fee paid to the Tribunal as well as other costs incurred by Mr. Gould.

15. At paragraph 1.2.6 it is suggested that Mr. Gould did not have an opportunity to present his books of account to the Tribunal. Mr. Gould is referred to paragraph 13 of the directions made at the hearing on 9 May. He should have produced any documents on which he relied in his statement of case. The Tribunal has already found (paragraph 46) that the summaries produced by Mr. Gould did not amount to proper service charge accounts.

16. At paragraph 1.2.7 it is suggested that the Tribunal did not make a determination on the change of use issue. Mr. Gould's application was for a determination that a breach of covenant had occurred. The Tribunal considered that application at paragraphs 40 to 43 of its

reasons, decided that it was not satisfied that there had been a breach of covenant and refused to make a determination as requested by Mr. Gould. His application failed.

17. Rule 13(7) of the Tribunal Rules permits the amount of costs to be paid to be determined by summary assessment by the Tribunal. The Tribunal proceeded to assess the costs of Mr. and Mrs. Sutor taking into account the submissions of both parties.

18. The Tribunal determined not to allow the invoice from Davies and Partners dated 7 April 2014 which covered work done from 3 September 2013 to 31 March 2014 as it did not appear to relate to work done which was incidental to the applications. It appeared to relate to work done before the issue of the first application.

19. The Tribunal allowed the invoice from Davies and Partners dated 17 July in the sum of £960 including VAT. The description of the work done shows that it was directly related to the applications, including examination of Mr. Gould's planning documents which would have been necessary to consider the applications for dispensation. The amount of time spent and the hourly charge appear reasonable.

20. Mr. and Mrs. Sutor claimed an hourly charge of £18 for preparing their case. They claimed 35 hours for preparation and a further 5 hours for analysing accounts. Mr. Gould agreed the hourly rate but said that the amount of time was excessive. The Tribunal agrees with Mr. Gould and allows 20 hours in total at £18 making at total of £360.

21. Mr. and Mrs. Sutor claim loss of earnings for attending both the case management hearing and the final hearing. The Tribunal is not satisfied that Mr. and Mrs. Sutor have lost any earnings. They say that their employers were flexible with time off and allowed additional days of annual unpaid leave. They claimed loss of earnings at a rate of £18 but there is no evidence to show what they actually earn in their employments or that there was any actual loss. This item is disallowed.

22. Mr. and Mrs. Sutor claim travelling expenses of attending both the case management hearing and the final hearing. They claim mileage at 14 pence per mile. They give reasons why they had to travel separately. The Tribunal considered that this item should be allowed and that the amounts claimed are reasonable.

23. The following amounts are allowed:

9 May	Mr. Sutor travel	11.90
9 May	Mrs. Sutor travel	9.24
May/June	Preparation	360.00
26 June	Mr. Sutor travel	11.90
26 June	Mrs. Sutor travel	11.90
17 July	Davies and Partners costs	960.00
	Total	£1,364.94

24. In conclusion, the Tribunal has determined to make an order that Mr. Gould must pay the costs incurred by Mr. and Mrs. Sutor in the applications assessed in the sum of £1,364.94. That sum must be paid to Mr. and Mrs. Sutor by 4pm on 17 October 2014. The payment is not to be set off against any other sums which Mr. Gould may allege are owed to him by Mr. and Mrs. Sutor.

25. In so far as Mr. Gould is making an application at paragraph 2.5 of his submissions for an order that the fee which he paid on issue of the service charge application should be reimbursed to him pursuant to Rule 13(2) of the Tribunal Rules, the Tribunal refuses that application.

Right of Appeal

26. Any party to this application who is dissatisfied with the Tribunal's decision may appeal to the Upper Tribunal (Lands Chamber) under section 176B of the Commonhold and Leasehold Reform Act 2002 or section 11 of the Tribunals, Courts and Enforcement Act 2007.

27. A person wishing to appeal this decision must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with this application. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit. The Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal and state the result the party making the application is seeking.

28. The parties are directed to Regulation 52 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 SI 2013/1169. Any application to the Upper Tribunal must be made in accordance with the Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010 SI 2010/2600.

J G Orme
Judge of the First-tier Tribunal
Dated 19 September 2014