12076

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00BN/LSC/2016/0033**
Property	:	**Flat 4** **92b and 92c Carrswood Road** **Brooklands** **Manchester** **M23 9HA**
Applicant	:	**Miss Ann McCalliog**
Representative	:	**N/A**
Respondent	:	**St John's Wood Management Company One Limited**
Representative	:	**Slater Heelis LLP, Solicitors**
Type of Application	:	**Landlord and Tenant Act 1985 – s 27A** **Landlord and Tenant Act 1985 – s 20C**
Tribunal Member	:	**Judge J Holbrook**
Date and venue of Hearing	:	**Determined without a hearing**
Date of Directions	:	**20 December 2016**

DECISION

DECISION

1. **The applications are struck out.**

2. **The Applicant is ordered to pay costs to the Respondent in the sum of £525.00 plus VAT.**

REASONS

Background

1. On 26 May 2016 the Tribunal received an application in respect of the Property made under section 27A of the Landlord and Tenant Act 1985. The application was made by Miss Ann McCalliog, the long leaseholder of the Property, and sought a determination as to whether service charges in respect of the Property are payable and/or reasonable. The Respondent to the application is the management company which is a party to the lease.

2. Miss McCalliog also applied under section 20C of the 1985 Act for and order preventing the costs incurred in connection with these proceedings from being recovered as part of the service charge.

3. On 28 June the Tribunal issued directions for the conduct of the proceedings, pursuant to which Miss McCalliog was required to provide a statement of case explaining the grounds for her application by 5 August. A brief statement was received on 22 August following a number of reminders from the tribunal administration.

4. On 8 September the Respondent's solicitors applied for the proceedings to be struck out. A preliminary hearing was listed to consider the matter on 25 October at which I refused to strike out the proceedings – either for want of jurisdiction or on the ground that they had no reasonable prospect of success.

5. The preliminary hearing afforded an opportunity to clarify the nature and scope of Ms McCalliog's application and, having done so, to make additional case management orders. It emerged that the application essentially amounted to a challenge to the recent replacement of windows in the communal parts of the building and that the Tribunal was being asked to determine:

   - Whether the costs of, or associated with, the window replacement scheme have been reasonably incurred; and

   - Whether the Applicant's liability to contribute to those costs is limited by reason of the Respondent's failure to comply with the statutory consultation requirements.

6. I explained that the very limited information the Applicant had provided in her application form and statement of case was inadequate to enable the management company to respond to the application effectively and was also insufficient for the Tribunal to determine the manner. Miss McCalliog agreed that (subject to the Respondent confirming the final cost of the window replacement scheme) she would provide a revised statement of case addressing in more detail the two key issues identified in paragraph 5 above.

7. Further directions were issued on this basis, pursuant to which the Applicant was required to provide her revised statement of case by 21 November. On 15 November Ms McCalliog requested an extension of time, saying that she had been unwell as the result of a long-term health condition. Despite the Respondent's strong objection to that request, I granted an extension until 28 November for Miss McCalliog to provide her revised statement of case. In granting the extension, I observed that, whilst no supporting medical evidence had been supplied, I accepted Miss McCalliog's assurance that she had been unwell. However, I also made it clear that the Tribunal would be reluctant to grant any further extension and that it would not do so on health grounds without adequate medical evidence. Miss McCalliog was informed that failure to serve her statement of case by the extended deadline may result in the application being struck out without further notice.

8. On 1 December the Respondent's solicitors informed the Tribunal that the Applicant had failed to serve a revised statement of case. They applied once again for the proceedings to be struck out, and also applied for a costs order. Miss McCalliog was invited to respond to these applications and, on 13 December, she sent an email in which she said that she did intend to respond but "should not be penalised for being self-employed and unwell". Miss McCalliog also said that she would "look at the paperwork this week and have a statement ready by Monday morning".

9. On Monday 19 December, Miss McCalliog emailed the Tribunal again. She requested five more days to produce her statement of case, stating that she had had "a very busy week and weekend preparing for a Care Quality inspection of my company." The Tribunal informed Miss McCalliog later the same day of my decision to refuse her request.

The strike out application

10. Rule 9(3) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules") gives the Tribunal power to strike out the whole or part of proceedings on a number of grounds. In particular, the proceedings may be struck out if the applicant has failed to comply with a direction which stated that failure by the applicant to comply with the direction could lead to the striking out of the proceedings (rule 9(3)(a)).

11. The Respondent now applies for the proceedings to be struck out on this ground, and it is clear that the Tribunal has power to do so: not only has Miss McCalliog failed to abide by the extended deadline of 28 November for submission of her revised statement of case, but she remains non-compliant with directions even now, notwithstanding the fact that she was notified of the management company's strike out application more than two weeks ago.

12. The question is therefore whether the Tribunal should exercise its discretion to strike out the proceedings.

13. I am satisfied that Miss McCalliog should not now be permitted to serve a revised statement of case. She has already been given ample opportunity to do so but has failed to meet the Tribunal's (extended) deadline or to provide a satisfactory explanation for this failure. It is clear that the latest delay is attributable not to any health issues which Miss McCalliog may have, but rather to the current pressures of running her business. This is not a sufficient excuse for flouting the Tribunal's case management orders, particularly in view of the fact that the Tribunal has already shown leniency to Miss McCalliog in this regard.

14. I have considered the possibility of permitting these proceedings to proceed to a substantive determination of the issues without Miss McCalliog's further participation. That would be an appropriate course to take if the applications stand a reasonable prospect of success on the basis of the information provided to date in the tribunal application form and in the Applicant's initial statement of case. However, I have concluded that the applications have no reasonable prospects on this basis and that it would therefore be wrong to put the Respondent to the time and trouble of responding to them given the inevitability of the outcome. For the reasons discussed at the preliminary hearing in October, Miss McCalliog has not provided sufficient information or evidence to enable her case to succeed: given that she accepts that the costs concerned are recoverable in principle, and she does not challenge the standard of the works in question, the Applicant's case would hinge on her argument that the works were unnecessary in the first place. She has not provided evidence to substantiate this. Similarly, the Applicant has not particularised her claim that the statutory consultation requirements were not complied with.

15. For these reasons, therefore, I consider that the applications should be struck out.

The costs application

16. The Tribunal's powers to make orders for costs are governed by rule 13 of the Tribunal Rules. The general principle (set out in rule 13(1)(b)) is that the Tribunal may only make an order in respect of costs if a person has acted unreasonably in bringing, defending or conducting proceedings before the Tribunal. The application of rule 13 has recently

been considered and explained by the Upper Tribunal (Lands Chamber) in the case of *Willow Court Management Company (1985) Ltd v Alexander* [2016] UKUT 290 (LC). The correct application of the rule requires the Tribunal to adopt the following approach when determining an application for costs:

1. Is there a reasonable explanation for the behaviour complained of?

2. If not, then, as a matter of discretion, should an order for costs be made?

3. If an order for costs should be made, what should be the terms of that order?

17. The Respondent contends that Miss McCalliog has acted unreasonably in the conduct of the proceedings because she has failed to comply with the Tribunal's directions. Whilst I do not consider that it is unreasonable to seek an extension of time for compliance with directions for genuine reasons of ill-health – and thus I consider Miss McCalliog acted reasonably when she requested an extension on 15 November – her conduct since then is harder to justify. The extended deadline passed without word from Miss McCalliog: she did not request a further extension before the deadline passed, nor did she provide any evidence about her current state of health. Indeed, when Miss McCalliog did finally ask for more time to comply with directions on 19 December, the reason she offered for her request related primarily to pressure of work and not to her health. As I have already said, that was not an adequate excuse for non-compliance and I therefore consider Miss McCalliog to have acted unreasonably.

18. It was not unreasonable for Miss McCalliog to have made the applications to the Tribunal. However, by subsequently failing (without good reason) to provide the information necessary to enable the matter to proceed effectively, she has caused the Respondent to incur avoidable legal costs. I consider it appropriate for the Tribunal to make an order in respect of those costs – but only to the extent that they are reasonable.

19. The Respondent seeks an order in respect of legal costs of £7,819.50 plus VAT. I have to say that I find the amount of the claim to be startling in the circumstances of this case. The Tribunal's original directions (issued of its own motion following receipt of the application) required some initial work on the Respondent's part in producing a pack of financial information (comprising service charge accounts, budgets and demands) for disclosure to the Applicant. This would have been a largely administrative task and would presumably have fallen principally to the Respondent's managing agents to deal with. Following completion of that task, however, the proceedings have not required the Respondent or its advisers to undertake significant amounts of work. In particular, the Respondent has not been required

to formulate a statement of case in response to the application. Notwithstanding this fact, however, it appears to have incurred very considerable legal costs.

20. The Respondent's solicitors have provided a summary statement of costs for summary assessment (in Form N260). It is clear that, save for small amounts of work by a partner and a paralegal, the costs comprise charges for a grade C solicitor in connection with the following activities:

Attendances on client and others:	12.7 hours
Attendance at the preliminary hearing:	2 hours
Work done on documents:	22.4 hours
Total:	37.1 hours

21. In addition, the costs claimed include counsel's fees of £1,250.

22. It is clear that a significant proportion of the costs concerned were incurred in respect of the strike out application made on 8 September and the hearing of that application on 25 October. I assume that counsel's fees were incurred in that regard, and I note that 13 hours of the solicitor's time working on documents also related to the strike out application, as well as time spent attending the hearing. However, it needs to be remembered that the strike out application was unsuccessful. I have previously explained the reasons why the Respondent's jurisdictional challenge to Miss McCalliog's application was legally misconceived. Given that fact, I can see no reason why Miss McCalliog should now be ordered to pay costs incurred by the Respondent in that regard, irrespective of her subsequent conduct.

23. Even if the costs of the unsuccessful strike out application are taken out of the equation, the Respondent is still seeking to recover the cost of about 22 hours work by its solicitor. I am not satisfied that the conduct of this relatively straightforward service charge application should reasonably have involved anything like this amount of work or time. I also consider that the resulting charge of £3,850 plus VAT would be disproportionate to the complexity of the case and to the amount in dispute: I note that the total cost of the window replacement works was £9,890 inclusive of VAT and that Miss McCalliog was therefore disputing a contribution of approximately £660 towards those costs.

24. I accept that some solicitors' costs will have been necessarily incurred in the provision of advice following receipt of the application; in connection with the disclosure of financial information to the Applicant; and also in connection with the general conduct of the proceedings thereafter. However, given that the proceedings never reached the stage at which a substantive response to the application was required, I consider that, for an experienced solicitor, the necessary work should not reasonably have taken more three hours to complete. I therefore conclude that Miss McCalliog should be ordered

to pay costs in respect of such work. The usual rate charged by the solicitor in question is £175 per hour. I therefore order Miss McCalliog to pay costs in the sum of £525 plus VAT.