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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00CA/LSC/2016/0058**
Property	:	**Flats 1 & 4, 9 Crescent Road, Liverpool L21 4LJ**
Applicant	:	**Gregory Birch and Monica Gigli**
Represented by	:	**Mr Appiah of AS Citizens Advice Agency**
Respondent	:	**Tuscola (FC101) Limited**
Represented by	:	**SLC Solicitors and Counsel**
Type of Application	:	**Respondents' application for costs in proceedings under Landlord and Tenant Act 1985, Section 27A and Section 20C**
Tribunal Members	:	**Mr J R Rimmer** **Miss S D Latham**
Date of Decision	:	**21 October 2017**

Order

The Tribunal finds that the Applicants and their advisors have acted unreasonably in the conduct of these proceedings and they shall pay to the Respondent the sum of £9096.40 in respect of wasted costs within 56 days hereof.

Preliminary

1. On 1st August 2017 the Tribunal determined the Application in respect of reasonableness of service charges in favour of the Respondent for the reasons set out in the decision published on the same date.

2. The Respondent has made application to the Tribunal that the Applicant should meet is proper costs in respect of the application under Rule 13(1)(b) Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. There is also within the initial application made by the Applicants a request for the Tribunal to make a determination affecting costs under Section 20C Landlord and Tenant Act 1985.

3. Rule 13(6) of the Rules require that the Applicants be given an opportunity to be heard in relation to the Respondent's application and in view of there also being an application under Section 20C being made as well the Tribunal issued directions to assist with the further consideration of those issues relating to costs:

Background

4. It is useful to review the progression of this case through the tribunal arena, not to cause embarrassment to any party involved, but to inform all concerned as to how we arrive at the current application from the Respondent.

5. The Applicants made application in the usual way, using form Leasehold 3, and providing a copy of the service charges for the year in question and a copy of a relevant lease. No other information as to the basis of the application was provided. This is not unusual. The application is dated 12th July 2016.

6. Accordingly, directions were provided on 9th December 2016 by the Regional Judge for the further conduct of the case. Included within them were directions for the Respondent to provide financial information and, thereafter, the Applicants were to provide a statement of case setting out the grounds of their application. The usual warning about failure to comply was appended to them. There has been no reason advanced, nor enquiry made, from the papers within the Tribunal's possession as to the time lag since the directions, but there appear to have been ongoing works to the building in the Autumn of 2016.

7. The Applicants, or their representative, did file what they referred to as a Position Statement on 17th January 2017. It raises spurious issues as to the identity of the Respondent, but identifies no substantive complaints about the service charges.

8. The Applicants failed to provide any other statement in support of their case and more comprehensive directions were given by a Deputy Regional Judge on 28th February 2017. Again, the standard warning is appended to them. The Applicants were to provide a statement in support of their application within 21 days. The Tribunal notes that the Applicants and their representative arrived late for the directions hearing. The Respondent's representative and the Deputy Regional Judge were kept waiting.

9. There was still no compliance with the new directions from the Applicants and no statement was forthcoming. The Respondent had however complied with the earlier direction to provide information and had filed a statement in support dated 20th December 2016. It then filed a further statement providing further information requested in those directions. The financial information was extensive. The hearing bundle is testament to that fact. The statement was necessarily vague, in part, as the Respondent had no detailed case to answer.

10. The Applicants provided a further Position Statement. It provided little information and the Respondent then provided a significant and lengthy justification of the service charge in a statement dated 24th April 2017. A short response was forthcoming from the Applicants. This again provided no detailed information as to the basis of a challenge to any aspect of the charges. Both the Applicants' documents can be found in the bundle, at pages 389 and 401 respectively. Three issues were raised in the vaguest manner, relating to the grounds, pipes and guttering, and the reserve fund.

11. Notwithstanding the paucity of information from the Applicants the matter was set down for hearing on 30th June 2017. The Respondent provided a witness statement and submissions in relation to costs, both in relation to section 20C Landlord and Tenant Act 1985 and the issue of the conduct of the proceedings by and on behalf of the Applicants.

12. The Tribunal inspected the property on the morning of 30th June 2017. The inspection was scheduled for 10.30am. It started at 10.50 because the Applicants and their representative arrived late.

13. The hearing was scheduled to take place at the Liverpool Civil Justice Centre at noon on the same date. By 12.20pm neither the Applicants, nor their representative, had appeared and the Tribunal proceeded in their absence, the Respondent and its representative having arrived in good time.

14. Shortly after concluding the matter the tribunal members were advised by telephone that the Applicants and their representative had attended the Tribunal Office in Manchester. The Respondent had departed. Having considered the reason for the failure to attend and the history of the matter the Tribunal did not consider it appropriate to re-open the case, other than to deal with the costs issues upon which directions were given so that the Applicants could be heard.

15. The Respondent in due course provide 2 schedules of costs. One related to the main proceedings and the second to the additional costs issues.

16. A further hearing was arranged for noon on 19th October 2017. It had already commenced by the time one of the Applicants and her representative, Mr Appiah, arrived, 15 minutes late.

The law

17 Rule 13 of the First-tier (Property Chamber) Rules provides that an order may be made :

> 13...
> (b) if a person has acted unreasonably in bringing, defending, or conducting proceedings in –
> (iii) a leasehold case.

18 The circumstances in which such an order should be made were considered extensively by the Upper Tribunal in Willow Court Management Company (1985) Ltd v Alexander & others (LRX90/2015) and in paragraphs 24 onwards in its decision the Upper Tribunal sets out its view as to what amounts to unreasonable behaviour, leading to wasted costs.

19 In paragraph 24, it is noted that (referring to the observations in Ridehalgh v Horsefield [1994 Ch 203] the leading authority on penalising unreasonable conduct in costs)

> ".. An assessment of whether behaviour is unreasonable requires a value judgement on which views might differ, but the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level...Unreasonable conduct includes conduct which is vexatious and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads to an unsuccessful outcome...Would a reasonable person in the position of the party have conducted themselves in the manner complained of?...Is there a reasonable explanation of the conduct complained of?

Hearing

20 At the hearing on 19th October 2017 Mr Appiah made it clear that the Applicants accepted that there would be an order for costs in favour of the Respondent and that as between himself and the Applicants it had been agreed that responsibility would fall upon the representative. The matter to be determined was the amount of those costs. This is considered below

Determination

21 This Tribunal is drawn to the inevitable conclusion that the conduct of the Applicants and their representative has been unreasonable. It may not have been vexatious and harassing, but it has certainly failed to advance the resolution of the case. It is clear to the Tribunal that no reasonable person would have conducted themselves in the manner complained of. The Tribunal has considered this in the light of the appropriate test suggested by the Willow Court case. In view of what is said in the preceding paragraph it is fortunately, not necessary for the Tribunal to examine at length the way in which the matter has been conducted any more than is set out above.

22 It remains, however, to ascertain the extent to which the Respondent was inconvenienced and put to greater expense than would otherwise have been necessary had the proceedings been conducted in a more acceptable manner.

23 With this in mind the Tribunal has considered the following factors in coming to its eventual conclusions:

- Whether the Respondent had contributed to increasing its own costs by not raising the issue earlier or seeking to have the application struck out before proceeding to a hearing?
- Whether there was any case at all that the Applicants could have raised and the Respondents required to answer, so as to require them to defend the proceedings with some rigour.
- The need to separate out the costs incurred by reason of the delay to hearings at various stages from the costs incurred in not having a clear and coherent case put forward for the Applicants.
- The extent of the costs of the Respondent that are properly attributable to those issues.

24 Has the Respondent contributed to increased costs?
The Tribunal has noted particularly that there are two matters that may in certain circumstances raise issues as to the reasonableness of the service charge. 9, Crescent Road is an old converted building situated in a deprived area of the Sefton Borough. The Respondent might be wise to anticipate some challenge to the balance between the cost and quality of services. There have also been major works. Either issue might be expected in due course to elicit a case of some sort from an Applicant, which in this case never materialised. Similarly, the directions of the Tribunal might be regarded as based upon that expectation, but no serious challenge to the charges was ever forthcoming. The Respondent made the point at the hearing that to engage with ancillary issues and costs earlier, or to seek to strike out proceedings may be an exercise that is more easily conducted with hindsight. In this case the Tribunal agrees with that view.

25 Was there any case at all against the Respondent?
In part this question has been answered in the preceding paragraph and it is reasonable to expect the Respondent to mount its best defence. The Tribunal also notes that the initial directions provided for the conduct of the case puts an onus on the Respondent to provide considerable financial and other information before the Applicant is required to better particularise his or her case. The Tribunal takes the view however that in this case the Respondent has been put to considerable expense to provide information from which no realistic case is ever produced. As such the Respondent is put to expense for no good reason.

26 Are the costs incurred through delay or lack of a case to propound?
The Tribunal has taken the view that in most part the delays caused by the Applicants are incidental to the more serious issue of the lack of a coherent case. Had the Applicants or their representative turned up at the right place at the right time the Tribunal would have been faced with the same issue as to the absence of any argued case against the reasonableness of the service charges. The Tribunal would refer to the two schedules of costs supplied by the Respondent's representatives and notes that the encompass charges for the days of the various hearings rather than being time based and it would appear that they would have been the same had each hearing been conducted in full, at the allotted time. Unnecessary costs relate therefore to the lack of a case from the Applicants. It is clear to the Tribunal that other aspects of delay, particularly failing to comply in a timely manner with directions and to communicate with the Respondent have contributed to an increase in costs and the Tribunal accepts that a representative, properly conducting the case for the Respondent will reasonably pursue instructions from its client and compliance from the other side

27 The extent to which the Respondent's costs are attributable to that issue.
The Tribunal examined at some length with the parties the two schedules of costs. It makes the following preliminary observations;

- The hourly rate for a grade B fee earner, dealing with tribunal work, of £150.00 an hour is reasonable when compared with higher rates accepted in County Court work
- The fees of barristers employed for the 3 hearings before the Tribunal are reasonable and may well be less than the amounts a solicitor might have charged
- The witness expenses for the attendance at the hearings on 28th February 2017 and 30th June 2017 were reasonable.

28 The Tribunal then considered the following more detailed issues:

- Whether there were any costs of the Respondent that were not necessarily incurred at all?
  Here the Tribunal is of the view that a considerable element of the time spent on review and bundle preparation, together with correspondence, phone calls and emails could have been avoided if the case for the applicants had been properly presented. Indeed, it is the view of the Tribunal that the vast majority of the work done on behalf of the Respondent was attributable to having no clear view of what case was being made and in attempting to secure compliance with directions from the Tribunal.
- The Tribunal was struck by what it considered the cumulative effect that failings had upon how the Respondent needed to deal with the case it faced and which would not have been the case had they been occasional, or isolated incidents.

29 In assessing the costs to be payable by the Applicants the Tribunal examined with the parties the two Schedules of costs at the hearing on 19th October 2017 and it came to the following conclusions. The tribunal apologises if its arithmetic, upon more sober reflection differs, slightly from that calculated at the hearing:

Schedule to 16th August 2017

Page 1 refers to 242 individual items of communication by letter, telephone, or email at £15.00 per item the Tribunal would consider no more than 150, together with the emails (23) would relate to additional work

£2595.00+VAT

Preparation and review must take account of the work that would have been inevitable initially to comply with the first directions and the Tribunal also considers some time would not be necessary in relation to work done by an experienced grade B fee earner. The Tribunal looked at the early elements of review and the time spent in the preparation of statements. It took the view that of the 20.5 hours claimed 13.5 hours is attributable to extra work.

£2025.00+VAT

Witness fees and travel are acceptable and could have been avoided	£ 522.40
Counsels fees are to be treated similarly	£ 900.00 +VAT
Add VAT	£1104.00
	£7146.40

Schedule from 17th August

The Tribunal considers that this work is necessary to deal with the costs application, but that 55 items of correspondence etc. would be sufficient. £ 825.00+VAT

Again, the Tribunal is of the view that 2 hours preparation and Consideration would be sufficient for a grade B fee earner

£ 300.00+VAT

Counsel's fees are acceptable	£ 500.00+VAT
Add VAT	£ 325.00
	£1950.00

Total, including VAT for the 2 schedules £9096.40

Section 20C Application

30. There is also an application within the proceedings under section 20C Landlord and Tenant Act 1985. Under section 20C the Tribunal may, if it considers it just to do so, limit the Respondent's right to recover its professional and other costs incurred in conducting these proceedings in the service charge for future years, notwithstanding an entitlement in the lease to do so. Both parties made submissions to the Tribunal as to whether or not such an order should be made. The Tribunal is minded to exercise its discretion to make such an order. The Tribunal has made one order in favour of the Respondent. There remains a discrepancy between that amount ordered against the Applicants and the total bill due from the Respondent to its advisers which might subsequently be recoverable within future service charges. There has, however, within these proceedings been an assessment of the reasonableness of the total costs. The Tribunal would consider it unjust and inappropriate to leave open the prospect of further proceedings in respect of the reasonableness of those costs (notwithstanding the fact that they relate not only to those unreasonably incurred, but also to those that would have been incurred in any event). If either party disagrees with that view they are invited to make any further relevant submissions in writing as soon as possible.