12745

FIRST - TIER TRIBUNAL

PROPERTY CHAMBER

(RESIDENTIAL PROPERTY)

Case References	:	**BIR/47UE/LIS/2017/0034** **BIR/47UE/LLC/2017/0010**
Property	:	**Albion Mill, Portland Street, Worcester WR1 2NY**
Applicant	:	**Ms Janice Saul**
Applicant's Representative	:	**Unrepresented**
Respondents	:	**Bromford Housing Group (1)** **Albion Mill (Worcester) Management Company (2)** **Berkeley Homes (Oxford and Chiltern) Limited (3)**
First Respondent's Representative	:	**Mr Stuart Armstrong of Counsel instructed by Anthony Collins Solicitors.**
Second and Third Respondent's Representatives	:	**Unrepresented**
Applications	:	**Applications by the Applicant and the First Respondent for an order that costs incurred by the second Respondent in connection with an application relating to service charges are not to be regarded as relevant costs in determining any service charges pursuant to s20C of the Landlord and Tenant Act 1985 (the Act).**
Date of Inspection	:	**27 November 2017**
Date of Hearing	:	**6 March 2018**
Tribunal	:	**Judge P. J. Ellis** **Mr Ian Humphries FRICS**
Date of Decision	:	**22 March 2018**

DECISION

The Decision

1. ***The Tribunal determines that upon a true construction of the lease the Second Respondent is unable to recover legal costs as service charges incurred by it in connection with the application for determination of the reasonableness of and the liability to pay service charges.***

2. ***In any event and further to S20C of the Landlord and Tenant Act 1985 the Tribunal determines that costs incurred by the Second Respondent relating to an application by the Applicant for a determination of the reasonableness of and liability to pay service charges are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant, the First Respondent. Ms Monika Trinder and Mr Zoltan Filkas***

Introduction

1. On 10 August 2017-Ms Janice Saul of 4 Albion Mill, Portland Street Worcester WR1 2NY issued an application for determination of her liability to pay and reasonableness of charges for services allegedly supplied by the Second Respondent. The Application included an application relating to costs of the proceedings pursuant to s20C of the Act. Ms Monika Trinder of Flat 1 Albion Mill and Mr Zoltan Filkas of Flat 3 Albion Mill were named as other persons to be included in the s20C application made by Ms Saul.

2. The substantive application was listed for hearing on 27 November 2017 when the Tribunal inspected the Property. After part hearing the application the matter was adjourned and relisted for hearing on 6 March 2018. In the interval the parties came to terms to settle the matter. The settlement agreement which was produced to the Tribunal did not conclude the issue of costs of the Second Respondent. Accordingly the Tribunal was asked to make a determination whether or not costs of the Second Respondent incurred in connection with the application are relevant costs to be included in any service charges payable by the Applicant, the First Respondent and two persons named in the Application.

The Parties

3. The Applicant is the shared owner of her flat with the First Respondent. They have a common interest in the outcome of these proceedings. The Applicant is a sub-tenant. Her interest in the Property arises from her ownership of a part share in her flat and a leasehold interest for the other part with the First Respondent with Bromford Housing Group (Bromford) which is the tenant of the Third

Respondent. Service charge invoices are raised by the Second Respondent, the management company and sent to Bromford which passes on the charge without addition to the Applicant.

4. Bromford were represented by Mr Stuart Armstrong of Counsel. Ms Saul was unrepresented albeit accompanied at the hearing by her sister Mrs Cook. The Third Respondent had taken no part in the proceedings but was represented at the hearing by an observer. The Second Respondent had previously instructed solicitors and counsel to represent it at the earlier hearing and in connection with negotiations to settle the dispute. It was represented at the hearing on 6 March 2018 by Mr Wilson a resident director. The legal expenses incurred by the Second Respondent were substantial and were the reason for the application for a declaration that they could not be added to service charges.

5. The Second Respondent was established as a right to manage company upon completion of the construction of the entire Estate known as Albion Mill. It has four directors, three of whom are also residents at Albion Mill including Mr Wilson. The fourth director is a nominee of Fortis a company which owns several flats which are sub-let to its tenants. Fortis has not taken any part at any time in these proceedings.

6. The Second Respondent retained Gem Estate Management Limited of Gem House, 1 Dunhams Lane, Letchworth, Herts SG6 1GL (Gem) to manage the Property. In summary the substantive issue between the parties was that the invoices rendered by Gem to the Second Respondent and consequently service charges raised in reliance upon them were not in accordance with the provisions of the lease. Although it is not now necessary to go into the issues giving rise to the dispute the Tribunal was informed that the terms of settlement require the Second Respondent to appoint alternate managing agents.

7. The grounds for the application presented by the First Respondent were twofold. First, that the lease does not permit the Second Respondent to recover legal costs incurred in conducting the dispute and secondly that the Tribunal should exercise its discretion and determine that it is just and equitable to determine that the costs are not relevant costs to be included in the service charges.

8. Mr Wilson was unable to state the total value of the costs which are in dispute but as this decision makes clear it is not necessary to particularise the costs as the Tribunal has determined that all costs incurred by the Second Respondent in

connection with these proceedings are not relevant costs for the purpose of the service charges.

The Property

9. The Tribunal inspected the Property on 27 November 2017. Albion Mill complex is a residential development of a refurbished Victorian era mill with some modern additions including one block comprising the flats occupied by the Applicant and the other persons named in the application. The Property includes car parking and paved areas between the constituent buildings. In view of the settlement it is not necessary to further describe the Property other than to note that the head lease draws a distinction between the Estate and the Applicants block known as the Building and service charges referable to both.

The Leases

10. In view of the First Respondent's submissions it is necessary to review relevant provisions of the leases.

The Head Lease

11. Bromford is the lessee of Flat 4 (Ms Saul's flat) pursuant to a lease made 25 October 2006 between Berkeley Homes (Oxford & Chiltern) Limited, Albion Mill (Worcester) Management Company Limited and Bromford (the Lease).

12. Clause 1 of the Lease provides definitions including
"the Estate, Land and premises at Albion Mill Worcester....."
"The Building, the building known as Block 1 (comprising 4 flats) erected on the Estate being plot 43 of which the Flat form a part....."
"the Service Charge, such sum as is equivalent to the Specified Percentage of the expenditure incurred by the Management Company in respect of the Building and the Common Parts in complying with its obligations under clause 5 hereof"

13. Clause 5 provides
"The Management Company hereby covenants with the Tenant and as a separate covenant with the Landlord to comply with the obligations set out in the Fourth Schedule"

14. The relevant provisions of the Fourth Schedule are set out in clauses 4.8 which describes Services to be supplied so far as practicable, in particular at clauses 4.8.5:

"to perform and carry out such other works and services in connection with the Estate and buildings thereon (including the Flat) as the Management Company shall in general meeting decide"

And 4.8.6:

" to employ such persons as the Management Company may in its absolute discretion consider desirable or necessary to enable it to perform or maintain the said services or any of them or for the proper management or security of the Estate and all parts thereof"

15. The Fourth Schedule is concerned with insurance, repairs and maintenance, future expenditure and services.

16. Clause 3.19 of the Third Schedule which sets out the tenant's obligations provides for payment of professional fees:

"to pay to the landlord or to the Management Company all reasonable and proper legal and other professional fees which may be incurred by either of them in connection with any of the following;

3.19.1. An application by the tenant for any consent here under.....

3.19.2 The preparation and the service of a notice under section 146 of the Law of Property Act 1925 and the preparation for and conduct of proceedings under section 146 or section 147 of that Act

3.19.3 The service of all notices and schedules relating to lots of repair of the flat whether the same be served during all within three months after the expiration or sooner determination of the term

3.19.4 The recovery of arrears of the Rent or the Service Charge"

The sub-Lease

17. The sub-Lease between the Applicant and Bromford was made on 19 January 2007. It provides in the Definitions section that the Service Charge and the Estate Maintenance Charge *"shall have the same meaning as defined in the Headlease"*. And by cl 3.2 the Applicant has covenanted to pay *"the Service Charge and Estate Maintenance Charge .....payable pursuant to the Headlease ..... for onward transmission to the head landlord .....and or the Management Company under the Headlease..."*

The Submissions

18. The Applicant and Bromford were clearly aligned in so far as the claim relating to costs is concerned. Bromford had instructed counsel and Ms Saul substantially relied upon the submissions of Mr Armstrong.

19. Bromford contended that the terms of the lease did not allow the Second Respondent to add the legal costs incurred in conducting its response to the application to service charges. Secondly Mr Armstrong contended that by reason of the facts of the case the Tribunal should exercise its discretion under S20C of the Act to determine that the costs are not relevant costs in any service charge payable by the Applicant.

The First Respondent's Submissions on legal costs and the lease

20. Mr Armstrong submitted that the relevant clauses in the lease authorising the management company to employ people were at 4.8.5 and 4.8.6 of the Fourth Schedule to the lease. The power of appointment was restricted so that those employed or retained were engaged for the primary purpose of maintaining the Estate or ensuring its proper management. Employment of anyone for work not connected with those tasks was unauthorised and their remuneration could not be passed on to the tenants. Legal work in connection with the Application was not connected with either Estate maintenance or proper management and fees incurred were irrecoverable. He contended clear words authorising the appointment of lawyers in connection with proceedings such as those the subject of these proceedings were required. Elsewhere in the lease other clauses do make specific reference to legal costs such as in connection with s146 notices (cl 3.19 Third Schedule) and assignment or other disposition (cl 3.26 Third Schedule). Clauses 4.8.5 & 6 are silent on the use of lawyers.

21. Mr Armstrong referred the Tribunal to the judgment of Lord Neuberger in Arnold v Britton [2015]AC 1619 at p 1627

"meaning has to be assessed in the light of it (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed and (v) commercial common sense but (vi) disregarding subjective evidence of the parties the intentions"

He then went on to other cases in which the courts and Upper Tribunal had decided the words of the relevant clauses did not permit recovery of legal costs. The tribunal accepts and agrees with the submission that the recovery of legal costs is a matter for construction of the lease.

22. In this case clause 4.8.6 empowers the management company " *to employ such persons as may in its absolute discretion consider desirable or necessary to enable it to perform or maintain the said services or any of them for the proper management or security of the Estate.*" Mr Armstrong submitted that legal costs are a by-product of the work of the management company. They are not services in connection with the estate. He made a distinction between actions which are concerned with management and proceedings which are a by-product of the services which are not the services themselves. This dispute concerns the adequacy of the management company and its ability to formulate correct service charge demands and is not concerned with the performance of services themselves.

23. Clause 4.8.6 is not intended to allow the Second Respondent to recover legal costs or to extend the scope of matters which fall within the service charges.

24. As there were specific references to lawyers elsewhere in the lease Mr. Armstrong relied upon the decision of Mr Martin Rodger QC in *Union Pension Trustees ltd v Slavin [2015] UKUT 0103(LC)* . In that case the terms of the lease provided for the employment of a variety of professional persons "*for the proper maintenance and safety... of...the Property*". There was no provision for lawyers in the list of professional persons. At para 61 of his decision Mr Rodger QC said:

> "*while I agree that the absence of a specific reference to legal expenses is not fatal, provided there is other language apt to demonstrate a clear intention that such expenditure should be recoverable, when considering the scope of any general words relied on for that purpose it is necessary to have regard to the relevant provisions of the lease*".

In that case as with the lease in this case there were other provisions referring to the appointment of lawyers. He held that the recovery of legal costs was not allowed under the terms of the lease.

25. The words of clause 4.8.6 are directed to the proper management of the Estate and the Buildings not to the appointment of lawyers. In *Sinclair Gardens Investments (Kensington) limted v Avron Estates (London) Limited [2016] UKUT 317,* another case referred to by Mr Armstrong, the relevant clause authorised the appointment of professionals including solicitors who are "*properly required to be employed in connection with or for the purpose of or in relation to the*

estate....and pay them proper fees...". Reviewing this clause HHJ Bridge affirming the need to consider the entire lease said at paragraph 32 *"the mere reference to solicitors in clause 6Aii cannot possibly mean that the landlord has carte blanche to instruct solicitors for any purpose. In my judgment the limit to their employment is that they must be employed for the purposes of the management of the estate"*

26. In response to questions from the Tribunal Mr Armstrong described applications to the Tribunal for example in connection with consultations for works at the Property would properly fall within management of the estate and legal costs may be recoverable through service charges. However, as this case concerned the failure of the managing agents to render proper accounts the costs were not incurred in connection with the provision of the services anticipated by the Fourth Schedule.

The First Respondent's submissions on S20C

27. S20C of the Act provides:

(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 court residential property tribunal or leasehold valuation tribunal or the First-tier Tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, 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) .....

(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.

28. Mr Armstrong relied upon the failure of Gem to properly calculate the service charges and that the settlement agreement required the termination of their appointment to demonstrate that the Applicant had been entirely correct to issue the proceedings. The outcome included making a refund to the Applicant of some of the service charges previously paid. He asserted that it would be unjust for any costs incurred in connection with the proceedings by the Second Respondent to form part of the service charges. Bromford have not made any claim for their own costs but if the Second Respondent can add its cost to the service charges Bromford will pass those charges directly to the Applicant in accordance with the terms of her lease. Mr Armstrong submitted that it would be unfair for the sub-tenant to be treated in this way.

The Second Respondent's Submission

29. Mr Wilson informed the Tribunal that until these proceedings were issued members of the management company had not considered the sufficiency or adequacy of the Gem invoices and reports. He said that the company had no money other than that paid by residents. He was not happy with the level of fees rendered by the lawyers and Gem. He confirmed the settlement agreement recognises the inadequacy by the demand that GE be replaced.

The Decision

30. The Third Schedule of the head lease sets out the tenant's obligations and includes a clause entitled 'Payment of Fees'. That clause requires the payment of legal costs in specific circumstances. The clause makes no reference to legal costs incurred in connection with proceedings related to service charges other than costs incurred in recovery of those charges not their formulation.

31. Clause 4 of the Fourth Schedule authorises the appointment of agents for purposes associated with proper management of the Property. There is no reference to the appointment of lawyers in that connection.

32. Having considered the terms of the lease and the references to the use of lawyers elsewhere in the lease the Tribunal is satisfied that the lease does not allow recovery of legal costs through service charges where those costs were incurred in connection with these proceedings.

33. Further and in any event the Tribunal is satisfied the Applicant was correct to bring the original proceedings under s27A of the Landlord and Tenant Act 1985. Although the proceedings were settled the circumstances leading to the initiation of the proceedings were such that it would be inequitable for the Second Respondent to recover its costs through the service charge.

34. Although there was no personal criticism of Mr Wilson or his co-directors by the other parties there was little doubt that the service provided by Gem had been inadequate.

35. At the first hearing the Tribunal were told that there was considerable confusion on the part of Albion Mill regarding how service charges were calculated. The service charge invoices were based on information submitted by Gem to Albion Mill leading to the Second Respondent seeking an adjournment in order to recast the claim in accordance with the terms of the lease. The Second Respondent

agreed to use its best endeavours to identify the service charges for the Building and the Estate Maintenance charges.

36. The Tribunal was satisfied that it would be unjust and inequitable for Albion Mill to recover its costs incurred in defending the Applicant's proceedings by way of service charges. It was apparent that the Applicant had been entirely correct in seeking a determination from the Tribunal under s27 A of the Act and was vindicated by the outcome which included partial reimbursement of payments made.

37. Accordingly the Tribunal determines that the costs incurred by the Second Respondent in these proceedings are not relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant or the other persons named in the application.

Appeal

38. If either of the parties is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to them rule 52 of The Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013.

.....

Judge PJ Ellis