12679

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AG/LAC/2018/0001**
Property	:	**50 and 60 Reachview Close, London NW1 0TY**
Applicants	:	**El-Gamal & Co. Ltd (1)** **Fahmay El-Gamal (2)**
Representative	:	**LMP Law Limited**
Respondents	:	**Reachview Freehold Limited (1)** **Reachview Management Company Limited (2)**
Representative	:	**Comptons Solicitors LLP**
Type of application	:	**For the determination of the liability to pay a an administration charge (Sch 11 Commonhold and Leasehold Reform Act 2002)**
Tribunal members	:	**Tribunal Judge Dutton** **Mr N Martindale FRICS**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of decision	:	**26th March 2018**

DECISION

Decisions of the Tribunal

(1) The Tribunal determines that the sum of £13,865.40 is payable by the Applicants on a fifty fifty basis in respect of the administration charge sought following an application under s168(4) of the Commonhold and Leasehold Reform Act 2002 culminating in the decision of this Tribunal in case reference LON/00AG/LBC/2017/0018 and 0019 (the Decision) between these parties dated 11th July 2017.

(2) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the Tribunal proceedings may be passed to the lessees through any service charge

(3) The Tribunal declines to make a finding that the Applicant can bring a claim for costs under rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 (the Rules) for the reasons set out below

The application

1. The Applicant seeks a determination pursuant Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of an administration charge payable by the Applicant in respect of costs incurred by the Respondents in bringing a claim under s168(4) of the Act.

2. The proceedings leading to this application were commenced in the Tribunal and the Decision was issued dated 11th July 2017. That decision found that there had been breaches of their respective leases by the Applicants in this case. The Respondents in this matter sought to recover their costs under the provisions of the leases, said to be clauses 12(ii) and 2(15). Copies of the leases were included in the bundle provided for the determination.

3. The relevant legal provisions are set out in the Appendix to this decision.

The background

4. It is not necessary for us to recount the details of the Decision, it is common to both parties. Suffice to say the Tribunal considering the matter found that there had been breaches of some of the conditions and covenants by the parties of their respective leases, but not all that were alleged.

5. Notwithstanding that the Decision is dated 11th July 2017, the Applicants, it is alleged, had not complied with the finding in the Decision and continued to be in breach. Notices under s146 of the Law of Property Act 1925 were, it seems served on or around 16th August 2017.

6. This matter came before us for determination as a paper case following directions issued on 8th January 2018. In a lengthy statement of case dated 9th February 2018 it is alleged by the Applicants' solicitors that there has been non-compliance with the directions by the Respondents. In particular it is said that there has not been disclosure of the terms of engagement of the Respondents' solicitors. Further it is said that the schedule of costs produced is defective in that it is not signed, that it does not follow the CPR rules and does not have a certificate as to the extent of costs liability of the client.

7. It is also said on behalf of the Applicants that no section 146 Notice should have been issued for the reasons set out in the Applicants' statement of case. Further, an alleged failure to proceed to mediation is also put forward as a ground for reducing or indeed refusing any costs award to the Respondents. The Applicants also seek to refer to pre commencement correspondence although it is not clear from the Decision that these were issues raised at that time, other than at paragraph 43. There are also allegations that Comptons have, somehow, breached the Solicitors Regulation Authority Code of Conduct, issues which we can say now we do not propose to consider. If there has been such breaches as alleged the Applicants should deal with the Authority, it is not for us to make any findings.

8. At paragraph 52 onwards the Applicants set out their objections to the costs under five headings, which we have noted. In particular we have noted the position under heading (e) and paragraph 57.

9. There are objections to any right for the Respondents to recover costs under s20C and what we take to be an application for the Applicants to recover costs under rule 13 of the Rules.

10. The Respondents replied by a statement in response dated 23rd February 2018. This was an equally extensive document. We noted all that was said. The provisions of clauses 12(ii) and 2 (15) were set out, as was the extract from the Act relating to forfeiture. Reference is also made to clause 2(21) of the Lease. There are details of what purports to be the running costs of the various stages of the proceedings. The response addresses the issues relating to pre-action correspondence, alleged refusal to mediate, post determination conduct, the alleged breach of the directions and finally proportionality of the cost. We again noted all that was said.

11. Annexed to the response is a statement of costs for summary assessment dated 23rd February 2018 and signed by Mr Finebaum a solicitor with Comptons. This shows a total liability of £15,665.40 inclusive of VAT, Counsels fees of £2,100, Tribunal fees of £600 and limited disbursements of £27 for Land Registry copies.

12. Matters did not stop there as a further lengthy response was filed on behalf of the Applicants dated 2nd March 2018. We have noted the contents. A letter in response was sent to the Tribunal by Comptons dated 6th March 2018, which should, in accordance with Tribunal rules, have been sent to the Applicants. It clearly states that there is no "Conditional Fee agreement".

Findings

13. We shall first address what we regard a somewhat "satellite" issues. We should say at the outset that this is not a rehearing of the issues that resulted in the Decision. The Application is to determine the liability to pay an administration charge under schedule 11 to the Act.

14. Firstly it seems to be accepted that this is an appropriate application under schedule 11 of the Act and that we should consider the reasonableness of the costs being sought under the provisions of paragraph 5.

15. There are issues raised with regard to the post and prior actions of the Respondents. At the directions hearing for the main action leading to the Decision the question of mediation could have been raised. It is not clear it was. Be that as it may we do not consider that this is a matter that we need to consider to any great degree. We have seen what both sides say and the arguments advanced. Mediation will only be successful if parties are prepared to compromise. It seems that the Applicants unwillingness to agree that a breach had taken place stymied the process from going further. We tend to agree with the Respondents' stance. The mediation would likely be with regard to any steps taken to enforce the terms of the leases. The press for mediation in the Courts is of course to reduce costs. This is ordinarily a non-costs jurisdiction. Although clearly not in this case. However, we do not propose to take this element any further. The fact of the matter is that in the Decision the Applicants were found to be in breach of their leases, albeit not to the extent contended for.

16. As to the issue of the notices under s146 all we say is that the final paragraph of the Decisions draws to the Applicants attention the repercussions if the breaches are not bought to an end. The Decision is dated 11th July 2017 and it is over a month before the notices are sent. There appears, at paragraph 25 of the Applicants' statement of case to be a suggestion that mediation should have taken place in respect of these costs proceedings. If that is the case we do not consider that to be

a reasonable suggestion. The matter is to be determined on the papers. Mediation would be a more expensive route to resolution.

17. As to actions/conduct before the main proceedings commenced is concerned we note all that is said. These issues appear to have become conflated with post actions. Anything before the original claim leading to the decision seems to us to be irrelevant. Whether a letter written in 2014 may have contained wording which misled the Applicants, a fact denied by the respondents, the action for forfeiture did not take place until some years later. We are not wholly clear whether it is being alleged that a s146 notice was also issued in respect of these costs. If it was, we find it be inappropriate.

18. In the further response dated 2nd March 2018 much is taken up with the thoughts in respect of a conditional fee agreement, which the Respondents' solicitors deny. In truth we do not understand the import of paragraph 6. The previously lodged assessment was lacking the certificate and signature. That seems to have been corrected. We do not understand why the sums would change or what is being argued for.

19. The non-compliance with the directions now appears to have been dealt with. We have copies of letters which purport to be terms of business showing the hourly charging rates applying at the time, which do not, of themselves appear to be challenged. We do not consider that any late delivery as prejudiced the Applicants, given the voluminous submissions they have been able to make.

20. We turn then to the question of the costs and what is recoverable. The Lease at clause at clause 2(15) says this

"To pay all expenses (including solicitors' costs and Surveyors' fees notwithstanding that such cost and fees shall have been incurred or expended after the expiration of the demise hereby granted whether by effluxtion of time or otherwise incurred by the Lessor incidental to the preparation and service of a notice under Section 146 and 147 of the Law of Property Act 1925"

21. We consider that the word 'incidental' means that costs incurred before the commencement of proceedings under the Act are recoverable, to a point. A determination under s168(4) of the Act is required before a notice can be served. Accordingly we find that costs incurred from the letter before action would be 'incidental' as referred to in the lease clause. We accept that the letter was sent. It seems to us that it is for the Applicant to show it was not sent, a copy, we presume from the solicitors file, has been produced.

22. We have considered the statement of costs. It would seem that the costs are dealt with on a 6 minute basis, which would be usual. There is no

breakdown of the letters written to the client other than it would seem that some 5 hours and 18 minutes were spent. As to telephone calls this totals some 1 hour and 12 minutes. The attendance on the other side total some 5 hours and 42 minutes and on others, for which no detail is given, it is claimed that 3 hours and 18 minutes where spent in respect of letters and emails and 3 hours and 54 minutes on telephone attendances. This is a lot of time on what was a relatively straight forward application to the Tribunal by an experienced firm in relation to Tribunal matters. We should say that the details set out on page 9 (page 224 of the bundle) are unhelpful. It is not clear how we are to make use of this information. The cost of a letter before action, taking well over an hour, seems excessive. We then have a leap to £809 for a further pre action letter and then an unexplained leap to £5,558 in relation to mediation, which presumably included the attendance at the directions appointment.

23. The schedule showing work on documents discloses costs amounting to £5,090. Like the Applicants we do not understand why a solicitor would travel to the Applicants for service. The lease appears to provide for service under s196 of the Law of Property Act 1925.

24. Doing the best we can on the information given to us by the Respondent, and from the starting point of a summary assessment on a standard basis, there being it seems to us no reasons given to us to assess on an indemnity basis we conclude as follows.

25. On the costs for letters, emails and telephone the sum claimed is £5,342. The response from the Applicants refers to 'non-exhaustive' additional observations. Now is the time for full observations. There is no indication that the time spent under this heading is challenged, other than in respect of the general challenges we have referred to above. There is no specific challenge to the time spent or the rates. The summary confirms that the costs claimed do not exceed the costs payable by the client. In those circumstances therefore we consider that the amount claimed, although appearing high should be allowed.

26. We turn then to the specified times spent on documents. There is duplication, for example the consideration of the leases and the allegations and the researching of the law. The Applications would be in essentially the same terms and spending over 1.5 hours seems excessive. It is not clear what documents were prepared for the applications nor what was done to 'consider the matter'. The preparation of bundles might have been dealt with at a lower fee earner rate, but we have no indication that any were used. The time spent for drafting and serving the notices under s146 appears to have an element of duplication in that a further £56 is claimed and is, in itself excess as stated by the Applicants. Taking these matters into account we propose to reduce the costs incurred under this heading as follows:

- Considering lease 1.2 hours at £260 allowed = £312
- Researching .8 at £260 allowed = £208
- Drafting application 1 hour allowed = £260
- Preparing documents for application disallowed
- Considering matter disallowed in total
- Preparing bundles reduced to reflect lower fee £390
- Drafting and serving s146 notices 1 hour £280.

27. Utilising the numbering on the Schedule we find that the costs recoverable are

1. £312; 2. £208; 3. £260; 4. £78; 5. nil; 6. nil; 7. £390; 8 £468

9. £390; 10. £336; 11. nil; 12. £168; 13. £168; 14. £168; 15. £280

16. £56; 17. £84; 18. £56 and 19 £168. Total £3,590.00

28. On the question of Counsel's fees we find that they are payable as sought. The use of Counsel at a CMC is perfectly acceptable and it does not appear that there was any claim for attendance by solicitors. In so far as the hearing is concerned the decision helpfully records that the case did not finish until 4.45pm, presumably starting at around 1.30pm. A brief fee of £1,500 to include the preparation for the hearing does not seem excessive. The Tribunal fees are correct and the disbursement for Land Registry documents is recoverable.

The Tribunal's decision

29. The Tribunal determines that the amount payable in respect of the costs under schedule 11 is assessed at £ 8,932 for solicitors' costs, £2,100 for Counsels fees, VAT of £2,206.40 and disbursements of £627 making a total due of £13,865.40

Application under s.20C and refund of fees

30. In the statement of case the Applicants applied for an order under section 20C of the 1985 Act. Having considered the submissions from the parties and taking into account the determinations above, the Tribunal determines that it is just and equitable in the circumstances

for an order to be made under section 20C of the 1985 Act, so that the Respondents may not pass any of the costs incurred in connection with the proceedings before the Tribunal through the service charge. In assessing the costs in this application we find that any attempt to recover the balance through the lease, if allowed for, would likely give rise to potential proceedings under s27A of the Landlord and Tenant Act 1985 and we would venture to suggest that there has been enough litigation on this dispute.

Applicants' application under rule 13 of the Rules

31. We do not consider that the Respondents have acted in a manner which would entitle the Applicants to make an application under rule 13. We have considered the provisions of the rule and cannot see that there has been any conduct which could be classified as "unreasonable".

Name: Tribunal Judge Dutton **Date:** 26th March 2018

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the Tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the Tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 20C

(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 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) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property Tribunal, to that Tribunal;
- (b) in the case of proceedings before a residential property Tribunal, to the Tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property Tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the Tribunal;
- (d) in the case of arbitration proceedings, to the arbitral Tribunal or, if the application is made after the proceedings are concluded, to a county court.

(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.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
- (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
- (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
- (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate Tribunal for a determination whether an administration charge is payable and, if it is, as to—
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate Tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral Tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).