



First-tier Tribunal Property Chamber (Residential Property)

Case reference : **CAM/22UH/LSC/2018/0066**

Property : **1-33 Brooklyn Court
High Road
Loughton
Essex IG10 1AQ**

Claimant : **Metropolitan & City Properties (Loughton) Ltd**

Defendant : **Brooklyn Court Limited**

Date of Transfer : **6th September 2018
(Received by the Tribunal 25th October 2018)**

Type of Application : **Application to determine the reasonableness and
payability of service and administration charges**

Date of hearing : **12 February 2019**

Date of Decision : **12 February 2019**

Date Written : **25 March 2019**

The Tribunal : **Judge Reeder
Mr S Moll FRICS
Mr N Miller**

DECISION

Crown Copyright ©

DECISION

- 1. The parties agreed that the sole issue for the court was the costs of the Tribunal proceedings.**
- 2. The Tribunal determined that it is appropriate in the circumstances to make an order pursuant to section 29 of the Tribunals, Courts and Enforcement Act 2007 and Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 requiring the defendant to pay the claimant's costs incurred in relation to these Tribunal proceedings since 2 November 2018, being the date of the directions order made by Regional Judge Edgington.**
- 3. As these proceedings are a component part of larger proceedings in the county court (E50YX831) and transferred by an order made by Deputy District Judge Robson on 6 September 2018, the assessment of the quantum of those costs is left to the Learned Judge in that court when considering the costs of the entire proceedings.**
- 4. The Tribunal also determined that it is appropriate in the circumstances to make an order pursuant to section 29 of the Tribunals, Courts and Enforcement Act 2007 and Rule 13(2) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 requiring the defendant to reimburse to the claimant the whole of the fees paid to the Tribunal since 2 November 2018, being the date of the directions order made by Regional Judge Edgington. That sum shall be paid by the defendant within 14 days of being notified of the fees paid by the claimant's solicitor.**
- 5. In accordance with the order for transfer to this Tribunal made by Deputy District Judge Robson on 6 September 2018 either or both parties should, subject to the appeal period, referred to below, as soon as practicable apply to lift the stay in the county court and notify that court of any settlement of the remaining issues or any issues which remain in dispute and which the parties want that court to determine.**

REASONS

Transfer from the county court

- 6. This matter came before the Tribunal pursuant to an order made in E50YX831 by Deputy District Judge Robson sitting in the County Court at the Mayors & City of London Court on 6 September 2018. That order was not produced by the court until 22 October 2018 and not received by the Tribunal until 25 October 2018.**

The claim in the county court

7. The claim (E50YX831) was issued in May 2018 and the claim form appended formal particulars of claim alleged unpaid service charges for the accounting years 2015 (£4,015.53), 2016 (£7,256.27), and 2017 (£6,618.77). Exhibited to that pleading was a copy of the lease, the demands served for each accounting year, the prescribed summary of the tenant's rights and obligations served with each demand, the service charge accounts, and pre-action open correspondence seeking payment. During that correspondence the claimant was represented by Messrs Howard Kennedy solicitors, and the defendant by Messrs Taylors chartered surveyors. The position taken for the defendant was that the works being recharged for had not been carried out and that supervision of such works was not being carried out.
8. The Defence filed in June 2018 was on pro forma N9B and could reasonably be described as cursory, stating "the claimant's claim is for work which has not been done in accordance with the lease". That defence form was completed by Mr Derek Gale as director of the defendant, Brooklyn Court Limited.
9. A formal Request for Further Information and Clarification of that Defence dated 13 July 2018 was not responded to prior to the order for transfer to the Tribunal made by Deputy District Judge Robson on 6 September 2018. That order provides –
 - (1) The claim is stayed.
 - (2) The claim is referred to [this Tribunal] for determination of the amount of service charges due if any from [the respondent] to [the claimant] under a lease dated 31 July 2018.
 - (3) Either party may apply to lift the stay once [this Tribunal] has issued its award.

The Tribunal's directions

10. On 2 November 2018 Regional Judge Edgington issued a Tribunal directions order. This order directed a detailed statement of case from the defendant, a reply by the claimant, a statement from the defendant setting out any challenge to each service and administration charge item (with any sum which it would agree to pay), exchange of relevant documents, exchange of witness statements, the arrangement of a property inspection, and the preparation of a hearing bundle.
11. Direction 1 of the Regional Judge's order required that the defendant file and serve "a full and detailed statement of case setting out what work has not been done in accordance with the lease and what exactly is said to be wrong with the work". This was due by 16 November. Despite this clear direction the defendant did not file a statement of case until late November/early December as it is dated 30 November 2018. Whilst this was within the proposed amended timetable agreed by the parties in an undated

'consent order' it is an example of the lax case management of the defendant which is evident both here and elsewhere in the proceedings.

12. Instead of complying with the statement of case, the defendant formally pleaded to the particulars of claim issues in the county court by denying having a full breakdown of the "invoices incurred", averring that cleaning and pest control services were not to a reasonable standard, and then pleading to the individual invoices received by admitting them or denying them without providing any further information of use to the Tribunal if determining the service charge issues. In that statement of case the defendant also sought a determination "as to the reasonable apportionment of the service charges between the flats and the commercial shops in the premises". That statement of case formally admitted that £17,890.57 had been demanded and remained unpaid, and formally denied that the sum is due. The Tribunal does not consider that this statement of case by the defendant complies with the directions order made by the Regional Judge.
13. The claimant filed and served its Reply dated 14 December 2018 which summarised when, how and to whom the service charge information had been provided for the relevant years, and quite sensibly provided a 'Schedule of Service Charge Issues' in Scott Schedule form and invited the respondent to use it to address the works and services carried out and re-charged as services charges.
14. This produced the 39 page schedule in the hearing bundle. The Tribunal considers that the defendant did not materially clarify its position in the Scott Schedule and in completing it as it did certainly still does not comply with the directions order of the Regional Judge. In particular it did not comply with Direction 3 which required the respondent to set out what it considered to be a reasonable amount in respect of each claim and state why that amount had not been paid. Conversely, the claimant's summary narrative in that Schedule clearly identified the works and services provided, the costs of the same, and the defendant's liability to pay for them pursuant to the lease in a concise and efficient manner.
15. The Tribunal directions order dated 2 November 2018 required that any witness statements which any party sought to rely upon must be sent to the other party by 4pm on 3 January 2019. That individual direction expressly warned that "failure to comply may mean that the Tribunal will refuse permission for that witness to give evidence".
16. That order also required the parties to serve all documents it relied upon to support its case by 4pm on 3 January 2019, again followed by an express warning that "failure to comply may mean that the Tribunal will refuse to consider a document".
17. The parties agreed to extend those deadlines to 4pm on 17 January 2019 by an undated 'consent order' included in the hearing bundle.
18. At 17.56 hrs on 16 January 2019 the defendant requested a 7 day extension as "[the defendant's] agent will be giving the evidence and.....he requires further time". The

claimant's solicitor "reluctantly" agreed to this request by letter dated 17 January 2019 and requested a draft consent order for signature. None was received. The claimant's solicitor wrote a further letter on 28 January 2019 pointing out that no consent order for the extension had been received, that the 7 days extension had now passed, and that the defendant had not served either its witness statement or the documents it relied upon. Throughout that 'delay and extension' correspondence the defendant was represented by Messrs Wiseman Lee solicitors.

19. In compliance with the Tribunal directions order the claimant filed and served a statement from Mr Craig Gottlieb (director of the applicant) which detailed the building, the claimant's freehold interest, the defendant's leasehold interest, the relevant lease provisions, the works and services delivered and relevant costs incurred thereby now sought as service charge, and the documents relied upon to support the service charges claimed.
20. The claimant provided the Tribunal with hearing bundle under cover of a letter dated 31 January 2019. That letter noted that the sections for the defendant's witness statement and documents relied upon were empty as neither had been served.

The inspection

21. In accordance with the directions order made by the Regional Judge on 2 November 2018 and the covering letter identifying the responsibility of the defendant to make arrangements for an inspection prior to the hearing the members of the Tribunal attended at Brooklyn Court on the hearing day.
22. The Tribunal was met there by the representatives of the parties who informed the Tribunal, for the first time, that the defendant no longer contested the service charge demands and that the parties had reached agreement on the same. The parties' representatives confirmed that the only issue was now the costs of the Tribunal proceedings.
23. As they had attended the property, and in case any party referred to the service charge issues at the hearing, the Tribunal took the opportunity to inspect the external parts and internal common parts of the block.

The hearing

24. The applicant was represented by Diane Doliveux of counsel instructed by Messrs Howard Kennedy solicitors. The defendant was represented by James Castle of counsel instructed by Messrs Wiseman Lee solicitors. Both produced written skeleton arguments on the issue of costs at the outset of the hearing. Neither objected to the other's reliance on the same at this late stage and so the Tribunal took the time to read those skeletons.
25. The Tribunal was provided with a 356 page hearing bundle which it had pre-read with

care in the expectation that it would be determining the service charge disputes.

26. The Tribunal was provided with a small ancillary bundle of documents which comprised the 'delay and extension' correspondence between Messrs Howard Kennedy solicitors and Messrs Wiseman Lee solicitors for the parties. This evidenced that the initial extension agreed to the Tribunal directions timetable was at the request of the defendant and because Mr Derek Gale was said, on 12 November 2018, to be "currently away on the high seas with no access to emails" and so unable to give instructions, and that the subsequent further 7 days extension request on 16 January 2019 was again at the defendant's request, and that despite agreement to the same it was not complied with and the claimant's solicitors chasing letters of 17 January 2019 and 28 January 2019 received no replies.
27. Both counsel made helpful oral submissions.

The case management decision relating to Mr Gale's witness statement

28. The initial issue considered as a preliminary issue was whether the defendant should be permitted to rely upon the witness statement of Mr Gale dated 4 February 2019. A copy was produced at the hearing. A copy had been sent to the Tribunal office shortly before the hearing. A copy was served on the claimant on 4 February. It has been compiled shortly before it was sent to Mr Gale who is in India and signed by him and returned to his solicitors on 4 February. This was beyond the agreed second extension deadline of 24 January. The applicant did not object to the witness statement being admitted as evidence in so far as it is relevant to the issue of costs.
29. The Tribunal had regard to Rules 3, 6(3)(g) & 8(2) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and determined that the defendant would be permitted to adduce as evidence and rely upon those parts of Mr Gale's statement dated 4 February 2019 which are relevant to the issue of costs, being paragraphs 1-4 of the statement and exhibit DG/1 to it.

The costs application

30. The hearing took place on Tuesday 12 February. Counsel confirmed that the defendant had admitted that the service charges were due as claimed at 3pm on Monday 11 February and that the defendant confirmed that it would seek an order for costs against the defendant at 4 pm that day. Both counsel confirmed that the only issues on which the Tribunal was invited to determine was the issue of the costs of the Tribunal proceedings.
31. Both counsel produced and relied upon clear and comprehensive written skeleton arguments on the issue of costs, developed the same with helpful oral submissions and answered the questions posed by the Tribunal. No disservice is meant to them by not

rehearsing those arguments in this Decision as they can be read in the skeletons filed.

32. The defendant initially contended that it had “not been given sufficient time or information to collate documentary evidence in support of its opposition to A’s application”. This was a difficult submission to substantiate given that a skeleton argument had been prepared, Mr Gale’s statement had been admitted, it was stated that it had proved impossible to obtain a written statement from the managing agent in any event, no application had been made to adduce written evidence or hear oral evidence from the defendant’s solicitor on the case management history, and Mr Castle had clearly and cogently taken every issue he reasonably could with some skill. Given the wholesale lack of any reasonable attempts to engage with the claim made over several months, the last minute decision not to dispute the service charges in the event, and the recent ‘delay and extension’ correspondence the defendant might reasonably be expected to have foreseen that an application for costs against it would follow. The Tribunal considered that in the circumstances it was reasonable and proportionate to deal with the costs application at this hearing, including because no material prejudice was caused to the defendant by doing so.
33. In considering whether to exercise its power to award costs the Tribunal had careful regard to section 29(2) of the Tribunals, Courts and Enforcement Act 2007 and Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 read against the overriding objective in Rule 3 of the 2013 Rules. The Tribunal was also mindful of the guidance given by the Chamber President and Deputy President in *Willow Court Management Ltd v Alexander, Sinclair v Sussex Gardens RTM, Stone v Hogarth Rd Management Ltd [2016] UKUT 0290 (LC)*. Both counsel were given ample opportunity to address the legal provisions during the hearing. In reaching its determination the Tribunal sequentially considered –
- (a) Applying an objective standard of conduct to the facts of this case, is the defendant guilty of unreasonable conduct in the *Willow Court* sense ?
 - (b) If so, should the Tribunal exercise its discretionary power to order that the defendant pay the applicant’s costs having regard to the nature, seriousness and effect of the unreasonable conduct and the circumstances of the case ?
 - (c) If so, what costs order should be made ?
34. The Tribunal reminded itself that a failure to clearly state its case, failure to properly adduce evidence in support of its case, seeking a wholly unrealistic outcome or indeed the actual unsuccessful outcome for the defendant is not of itself unreasonable conduct in the *Willow Court* sense, and that standard of behaviour expected of parties ought not to be set an unrealistic level. The Tribunal reminded itself of the treatment in *Willow Court* of the guidance given in *Ridehalgh v Horsefield* and asked itself : would a reasonable person in the position of the defendant have conducted themselves in the manner complained of ? or is there a reasonable explanation for the conduct complained of ?

35. The respondent was incorporated as limited company in 2003. The defendant did not dispute the evidence filed in relation to it. It has two directors, Mr Derek Gale and Ms Justine Buchanan. It has issued one sole share to Mr Gale. He is the only person who has ever dealt with the claimant directly on behalf of the defendant. During the relevant period he has represented that Messrs Taylor chartered surveyors (initially Mark Taylor, and more recently his son Elliot Taylor) have acted as managing agent for the defendant. During these proceedings the correspondence from Messrs Wiseman Lee solicitors has made clear that they are effectively instructed by Mr Gale. Mr Gale's witness statement dated 4 February 2019 (including its reference to "my managing agent") is consistent with this. The Tribunal concluded that Mr Gale is in effective control of the defendant for the purposes of the proceedings before the Tribunal, and has engaged the services of property and management and legal professionals.
36. In his statement dated 4 February Mr Gale states that "I had arranged for my managing agent to provide a statement as they have knowledge of what happened in relation to this service charge dispute.....unfortunately it has not been possible to obtain a statement from them". The Tribunal noted that neither Mr Gale nor his solicitor presented any material evidence of any actual reasonable attempts to, and any actual obstacles to, the defendant properly engaging with the service charge claim which was clearly and comprehensively set out by the claimant's solicitors both in the county court and in the documentary evidence generated in compliance with the Tribunal's directions. The county court claim was issued in May 2018. The Tribunal directions order was made on 2 November 2018. The defendant had ample time to engage with the claim and obtain any required evidence or information from his managing agent.
37. The evidence and information before the Tribunal established that there was as a matter of fact and law no tenable or rational let alone reasonable basis for disputing the service charge demands for the relevant years having regard to the circumstances of the case including in particular those issues referred to below. Further, the defendant's conduct of the case positively obstructed rather than advanced the resolution of the case and is the very antithesis of the overriding objective set out in Rule 3 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 including in the ways set out below.
38. No adequate reason was ever given for the refusal to pay the service charges which arose from the actual costs incurred in respect of the premium for landlord insurance clearly required by the lease, nor for then paying it in January 2018 ("as a sign of good faith"). The only service charge issues positively raised in pre-action correspondence related to relatively minor matters such as the cleaning of communal areas, rubbish clearance, access along a service road at the rear of the block, a single pest control episode, drain cleaning and a broken padlock to a roof hatch. The evidence was that each of these which proved to exist was remedied timeously.
39. By the time it filed the Defence in the county court in June 2018 the best the defendant could manage was a cursory statement that "the claimant's claim is for work which has

not been done in accordance with the lease”.

40. Instead of complying with the Tribunal’s direction requiring “a full and detailed statement of case setting out what work has not been done in accordance with the lease and what exactly is said to be wrong with the work”, the defendant formally pleaded to the particulars of claim issued in the county court by denying having a full breakdown of the “invoices incurred”, averring that cleaning and pest control services were not to a reasonable standard, and then pleading to the individual invoices received by admitting them or denying them without providing any further information of use to the claimant if reviewing its claim or to the Tribunal if determining the service charge dispute raised.
41. There was no suggestion in the documentary evidence generated in the county court or in this Tribunal, nor in any correspondence, of individual lessee complaints about any of the matters raised by the defendant. No lessee took or sought to take any part in the proceedings nor provided any evidence to support the defendant’s contentions. It was apparent that the defendant was collecting service charge contributions from individual lessees but there was no suggestion that they were refusing to pay those contributions because of service charge issues.
42. The 39 page Scott Schedule drawn up by the claimant for the defendant to complete included only summary restatement of the defendant’s previous cursory approach of denying and putting to proof in respect of the service charges which has been compellingly detailed and proven on the claimant’s evidence.
43. Despite extensions of the deadline for the same the defendant never filed a witness statement within the directions deadline. This was the final step in a wholesale failure to comply with the Tribunal’s directions as set out earlier in this Decision.
44. The documents exhibited to Mr Gale’s statement dated 4 February 2019 showed that on 6 June 2018 he booked and paid for a flight from the UK to India leaving on 30 November 2018 and returning to the UK on 2 April 2019. He did so clearly aware of the proceedings as they had been issued in May 2018. He was aware of the nature and scope of the dispute as formulated for the defendant as he himself had completed and signed the Defence in form N9B filed in June 2018. He was well aware of the requirements of and timetable for the Tribunal proceedings as his solicitors had written in November 2018 and January 2019 seeking extensions of time for complying with directions. Nonetheless he failed to comply with the extended deadline for his witness statement to be filed. No application was made for an adjournment based on his extended absence out of the UK which he had arranged in June 2018. No indication of any settlement of the service charge dispute was given prior to immediately before the hearing. The Tribunal was not informed of the settlement of that dispute until the pre-hearing inspection.
45. Despite the evidence and information before the Tribunal establishing that there was no tenable or rational let alone reasonable basis for disputing the service charge

demands for the relevant years the defendant continued to contend in the skeleton argument produced for the hearing that it “genuinely believed that it has valid complaints in respect of the provision of various services (eg. cleaning)”.

46. In the circumstances the Tribunal determined that it is appropriate in the circumstances to make an order pursuant to section 29 of the Tribunals, Courts and Enforcement Act 2007 and Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 requiring the defendant to pay the claimant’s costs incurred in relation to these Tribunal proceedings since 2 November 2018, being the date of the directions order made by Regional Judge Edgington.
47. As these proceedings are a component part of larger proceedings in the county court (E50YX831) and transferred by an order made by Deputy District Judge Robson on 6 September 2018, the assessment of the quantum of those costs is left to the Learned Judge in that court when considering the costs of the entire proceedings.
48. The Tribunal also determined that it is appropriate in the circumstances to make an order pursuant to section 29 of the Tribunals, Courts and Enforcement Act 2007 and Rule 13(2) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 requiring the defendant to reimburse to the claimant the whole of the fees paid to the Tribunal since 2 November 2018, being the date of the directions order made by Regional Judge Edgington. That sum shall be paid by the defendant within 14 days of being notified of the fees paid by the claimant’s solicitor.
49. In accordance with the order for transfer to this Tribunal made by Deputy District Judge Robson on 6 September 2018 either or both parties should, subject to the appeal period, referred to below, as soon as practicable apply to lift the stay in the county court and notify that court of any settlement of the remaining issues or any issues which remain in dispute and which the parties want that court to determine.

Judge Reeder
24th March 2019

ANNEX - RIGHTS OF APPEAL

- a. 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.
- b. 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.
- c. 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.
- d. 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.