



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **BIR/00FY/LLC/2021/0012 & 13**

Property : **Weekday Cross, Pilcher Gate,
Nottingham, NG1 1QF**

Applicants : **Dr LF Braganza (1)
ECD Cocking & B Cocking (2)**

Respondent : **Holding and Management (Solitaire) Ltd**

Representative : **J B Leitch Solicitors**

Type of Application : **Application for determination that costs of
Proceedings are not relevant costs of service
Charges pursuant to s20C Landlord and
Tenant Act 1985**

Tribunal : **Tribunal Judge P. J. Ellis
Regional Surveyor Mr V Ward FRICS.**

Date of Hearing : **2 December 2021**

Date of Decision : **9 December 2021**

DECISION

The Tribunal is satisfied it is just and equitable that the costs associated with the dispensation application are relevant costs for service charges.

The Application is dismissed.

Introduction and Background

1. These are two applications for determination that legal costs incurred by the Respondent in proceedings for dispensation with consultation requirements are not to be regarded as relevant costs to be taken into account in determining the amount of any service charges pursuant to s20C Landlord and Tenant Act 1985 (the Act).
2. The earlier proceedings for dispensation (BIR/00FY/LDC/2021/0016) were determined on 10 September 2021. The Tribunal granted dispensation in respect of works identified as *“Removal of the EPS insulation with plywood located behind the aluminium cladding across the building but predominantly found around the entire top floor of the building.”*
3. The dispensation application was opposed by the present Applicants at an oral hearing. They conducted the hearing without representation, but the Respondents were represented by counsel accompanied by instructing solicitor.
4. This application relates to costs incurred by the Applicant in pursuing the application for dispensation. The basis of the Respondent’s case is that it is entitled to its costs via service charges because the terms of the Applicants’ leases and it is just and equitable that the costs are recovered. The Respondent has submitted a costs schedule indicating the costs claimed are £6887.04 inclusive of VAT, counsel’s fees and disbursements. The Tribunal will not decide the amount of the costs in this Decision because it does not have an application to determine the reasonableness of the charges before it.

The Parties Submissions

5. The first Applicant submitted his application for this determination on 1 October 2021. He submits that the Applicant was inconsistent with its pursuit of a dispensation application after conceding that the works the subject of an application to the Building Safety Fund (BSF) would not go ahead if the application was unsuccessful.
6. Consequently, the costs were not properly incurred. If so the terms of the lease should not be construed to cover such costs improperly incurred. For that reason, it would not be just and equitable for him to pay the legal costs of the Applicant through the service charge.

7. The second Applicants also issued their application on 1 October 2021. Mr Cocking on their behalf submits that the construction of the terms of the lease does not require lessees to indemnify the Applicant against all costs and expenses or to make such application or representations. He also places reliance on the Applicant's stated position that works will not go ahead if the BSF grant is not forthcoming.
8. He referred the Tribunal to *Conway v Jam Factory Freehold Limited [2013] UKUT 0592 (LC)* and the decision of Martin Rodger QC that a percentage of costs were not to be regarded as relevant when determining service charges.
9. The Respondent's position is that the works are in the interests of the Applicants and the dispensation from consultation enabled the Respondent to comply with BSF requirements. The subject costs were incurred with running and managing the Block and in order to maintain the Block as good class residential units for the general benefit of all leaseholders. It asserts that the terms of the lease give it a contractual entitlement to recover the costs through the service charge. It would not be just and equitable to deprive it of costs incurred in reasonably making an application for dispensation.

The Leases

10. The relevant terms of the leases relating to payment of costs incurred in management are at paragraphs 5 & 13 Fifth Schedule which provide:

5. To make provision for the payment of all costs and expenses incurred by the Company:

(a) in the running and management of the Block and the costs and expenses (including Solicitors costs) incurred in the collection of rents and service charges in respect of the Units therein and in the enforcement of the covenants and conditions and regulations contained in the lease granted of the Units

(b) in making such applications and representations and taking such action as the Company shall reasonably think necessary in respect of any notice or order or proposal for a notice or order served under any statute order regulation or bye-law on the Lessee or any underlessee of the Flat or on any lessee or underlessee of any other Units in the Block or on the Company in respect of the Block or the curtilage thereof or all or any of the Units therein

13. To carry out all repairs to any other part of the Block for which the Company may be liable and to provide and supply such other services for the

benefit of the estate and to carry out such other repairs and such improvements works additions and such improvements works and additions and to defray such other costs (including the modernisation or replacement of plant and machinery) as the Company shall consider necessary to maintain the Block as a block of good class residential and commercial units or otherwise desirable in the general interest of the lessees of the units in the Block

The defined terms have the following meaning;

Company means the management company for the time being

Block means the residential portion of the Building

Building means the building of which the flat forms part

Unit means the individual residential flats and commercial units which have been developed within the overall the Estate, and

Flat means the flat described in the lease itself

The Statutory Framework

11. The provision which governs this matter is S20C of the Act relating to limitation of service charges: costs of proceedings.

(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)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 the county court;

(aa)in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;

(b)in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(ba)in the case of proceedings before the First-tier Tribunal, to the 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 the 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.

Decision

12. The background to this application is the works are required to maintain the Block as a block of good class accommodation as provided for in the lease. The works include work for which a BSF grant might be available. The Respondent behaved reasonably in making an application for dispensation so that it could respond appropriately to any conditions imposed by the BSF and also adopt a design and build contract which would be impossible if compliance with consultation requirements was necessary.
13. There are 98 flats or units in the part of the Building which are the subject of the BSF grant which will benefit from the works, although the Respondent has indicated that the cost of the works is such that it will not proceed with them without a BSF grant.
14. The Tribunal is satisfied the Respondent was acting reasonably in pursuing the dispensation application. In doing so it incurred legal costs in connection with the Tribunal hearing to deal with the objections of these Applicants. The need for a hearing is not a criticism of the Applicants but there are consequences of preparing for the required hearing. The ability of the Respondent to include the costs in the service charge depends on the construction of the lease.
15. Clause 5 of the Fifth Schedule opens with the statement of the purpose of that clause which is *“To make provision for the payment of all costs and expenses incurred by the Company:”*. Sub clause a & b refer to services. Clause 13 of the same schedule is expressed in terms which empower and require the Respondent to provide services which are for the benefit of the leaseholders. The Respondent contends that these clause are expressed in broad terms which enable the Respondent to pass on the costs it incurs in the service charge account.
16. Clause 5 and clause 13 of the Fifth Schedule both provide for the provision of services and recovery of costs incurred through the service charge. In particular clause 13 refers to the supply of such other services for the benefit of the Estate and expressly refers to defrayment of other costs considered necessary to maintain the Block as a block of good class residential units or otherwise

desirable. Pursuing a BSF grant for necessary works which would relieve the leaseholders of a burden is in the leaseholders' interests.

17. The Tribunal was referred to *Bretby Hall Management Limited v Pratt* [UKUT]70(LC) in which HHJ Behrens summarised general principles for determining when to exercise discretion to allow costs to be recovered through the service charge. He, in turn, referred to *The Jam Factory* [2013]UKUT 0592 which the second Applicant relied on. HHJ Behrens said:

"I was referred to a number of cases where s 20C has been considered including the decision of the Deputy President in The Jam Factory [2013] UKUT 0592 which contains a full review of relevant authorities. I shall not lengthen this judgment by setting out the lengthy passage from the report. I summarise what I take to be the principles:

- 1. The only principle upon which the discretion should be exercised is to have regard to what is just and equitable in the circumstances.*
- 2. The circumstances include the conduct of the parties, the circumstances of the parties and the outcome of the proceedings.*
- 3. Where there is no power to award costs there is no automatic expectation of an order under s 20C in favour of a successful tenant although a landlord who has behaved unreasonably cannot normally expect to recover his costs of defending such conduct.*
- 4. The power to make an order under s 20C should only be used in order to ensure that the right to claim costs as part of the service charge is not used in circumstances which make its use unjust.*
- 5. One of the circumstances that may be relevant is where the landlord is a resident-owned management company with no resources apart from the service charge income*

18. In this case it is just and equitable that the Respondent should recover its costs through the service charge because it has acted throughout in a reasonable and transparent manner for the benefit of the leaseholders. The Applicants were unsuccessful in their opposition to the dispensation application. It is not appropriate that unsuccessful opposition to a sensible application should leave the Respondent with a costs burden.
19. For this reason, the Tribunal determines that the Applicants are not entitled to an order under s20C of the Act.
20. In making this determination the Tribunal is not making any decision under s19 of the Act that the costs are themselves reasonable. That matter may be for a later determination when the service charge invoices are rendered.

Appeal

21. If either party 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 the parties and must state the grounds on which they intend to rely in the appeal.

Judge PJ Ellis