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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BK/LVL/2011/0013** **LON/00BK/LVL/2012/0008** **LON/00BK/LVL/2012/0010**
Property	:	**3&4 Whitehall Court, London SW1A 2EP**
Applicants	:	**The Lessees of Flats within Whitehall Court (as set out in a Schedule attached the original application forms)**
Respondents	:	**(1) The Crown Estate Commissioners** **(2) Whitehall Court (Investments) Limited** **(3) Mrs Caryl Topolski** **(4) Ms Corinna Oppler** **(6) Ms Dido Crosby** **And others**
Type of Application	:	**Costs**
Tribunal Members	:	**Judge John Hewitt** **Judge Jane Dowell** **Mr Luis Jarero BSc FRICS**
Date of Decision	:	**3 September 2013**

DECISION

Decisions of the Tribunal

1. The Tribunal determines that:

1.1 Rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the Rules) shall be and is hereby dis-applied to these proceedings;

1.2 The applications of the Applicants made by letter dated 12 March 2013 by their then solicitors, Forsters:

1.2.1 that an order be made pursuant to section 20C Landlord and Tenant Act 1985 (LTA 1985) to the effect that none of the costs incurred or to be incurred by the 2nd Respondent in these proceedings are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by them shall be dismissed;

1.2.2 for an order that the 1st Respondent do pay to them the sum of £6,012.60 by way of wasted costs shall be dismissed; and

1.2.3 for an order that the 1st Respondent do pay to each of the 37 Applicants the sum of £500 by way of costs pursuant to paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 (CLRA 2002) shall be dismissed;

1.3 The application of the 3rd, 4th and 6th Respondents made by letter dated 7 March 2013 by their solicitors, asb law llp:

1.3.1 that an order be made pursuant to section 20C LTA 1985 to the effect that none of the costs incurred or to be incurred by the Second Respondent in these proceedings are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by them shall be dismissed; and

1.3.2 for an order that the First Respondent do pay to them the aggregate sum of £1,158.00 by way of costs pursuant to paragraph 10 of Schedule 12 to CLRA 2002 shall be dismissed; and

1.4 The application of the 1st Respondent made in paragraph 52 of its submissions dated 22 March 2013 seeking an order that the Applicants and the 3rd, 4th and 6th Respondents should pay to it the sum of £1,158 by way of costs pursuant to paragraph 10 of Schedule 12 to the 2002 shall be dismissed.

Procedural background

2. The original 37 or so Applicants made an application pursuant to section 35 of the Landlord and Tenant Act 1987 (LTA 1987) for an order that their respective leases be varied as regards to the manner in which the contributions to services charges payable by them should be calculated. The 1st and 2nd Respondents made consequent applications pursuant to section 36 LTA 1987.

3. Given the number of parties involved and the complexity of some of the issues the applications were the subject of several directions/case management hearings. The applications finally came on for a substantive hearing before us on 15 and 16 January 2013. Our Decision is dated 11 February 2013. That Decision sets out the background to the proceedings in some detail so that we need not repeat that here in this Decision on the various costs applications.

4. As contemplated in paragraphs 143 and 147 of our substantive Decision some of the parties wished to make applications as to costs. These were duly made. Directions for the determination of them are dated 5 April 2013.

5. The applications as to costs made to us are those referred to in paragraphs 1.2 – 1.4 above.

6. The parties were notified that we proposed to determine the applications pursuant to Regulation 13 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 (the Regulations) on basis of the written submissions before us and without an oral hearing. The parties were reminded that at any time before we made such determinations they were entitled to make a request to be heard. No such requests have been received.

7. The Transfer of Tribunal Functions Order 2013 abolished rent assessment committees in England (and hence the Leasehold Valuation Tribunal) and transferred the functions of those committees to the First-tier Tribunal (Property Chamber) with effect on 1 July 2013.

8. The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 are to apply to all proceedings in hand at the time of the transfer save to the extent that all or any of those rules could be dis-applied and the previous regulation (s) adopted.

9. We met on 5 July 2013 to determine the costs applications. The materials before us comprised:

Letter dated 7 March 2013 from asb law llp;
Letter dated 12 March 2013 from Forsters;
Statement of case dated 13 March submitted by Stiles Harold Williams on behalf of the 2nd Respondent;
Letter dated 15 March 2013 submitted by Mr Michael Rossman;
Letter dated 19 March 2013 submitted by Mr Albert Scardino;

Statement of case dated 22 March 2013 prepared by Mr Upton and submitted on behalf of the 1st Respondent; and
Statement of case in reply (undated) prepared by Mr Hammond and submitted on behalf of the 3rd, 4th and 6th Respondents.

Decisions and reasons

Dis-application of Rule 13

10. First we gave consideration to the rules or regulations which should govern our deliberations. For avoidance of any doubt we decided to dis-apply Rule 13. Parts of the new costs regime provided for in the Rules are different to and arguably more onerous that the costs regime which prevailed prior to 1 July 2013. The substantive applications were made and determined under the previous regime and the costs applications were also made under the previous regime.

11. We considered that it would unjust and inequitable if a party were now to be subjected to a more onerous regime and potentially at greater risk as regards costs than the regime which prevailed during the course of the substantive proceedings. When deciding the strategy to be adopted in those proceedings a party may well have taken into account the risks or costs consequences of an action taken in the light of the costs regime which then applied. A different strategy may have been adopted if that party was aware that it was at greater risk or the costs consequences were or might become more onerous.

12. In any event the maximum of £500 provided for in paragraph 10 of Schedule 12 to CLRA 2002 still applies because the proceedings were current on 1 July 2013 and we considered it would be fair to the parties that we should determine the applications for costs under the previous regime rather than part under that regime and part under the new regime.

The Applicants' claim to costs

13. A substantive hearing of the section 35 application was set to commence on 12 April 2012. On 4 April 2012 the 1st Respondent issued its section 36 application and proposed to the Tribunal and the parties that the hearing on 12 April 2012 be treated as a directions hearing. In the event that is what occurred. However, the Applicants' solicitors had already prepared and delivered the trial bundles.

14. The first costs application made by the Applicants is for the sum of £6,012.60 said to be the costs wasted at the hearing on 12 April 2012. The supporting invoice is dated 30 April 2012. It is addressed to Michael Rossman. We do not know whether it has been paid, and if so by whom, or who may have contributed to it or in what proportions.
The Applicants do not cite or point to any authority or jurisdiction by which the Tribunal would be entitled to make such an order even if it were minded to do so. We know of none and thus we find we cannot make the order sought.

15. The next application was for costs to be awarded pursuant to paragraph 10 of Schedule 12 to CLRA 2002. The statutory provision was as follows at the time when the applications for costs were made:

> *"**10 Costs***
> *(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).*
>
> *(2) The circumstances are where—*
> *(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or*
>
> *(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.*
>
> *(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—*
>
> *(a) £500, or*
>
> *(b) such other amount as may be specified in procedure regulations.*
>
> *(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph."*

16. Initially, when the application was first made the then counsel for the Applicants made the application for one payment of £500. Similarly counsel for the 3rd, 4th and 6th Respondents made one application for a payment of £500 on behalf of all three of his clients.

On this footing the 1st Respondent was initially minded not to resist the applications for reasons of proportionality and cost.

Subsequently, different counsel for the Applicants sought to amend the application to 37 claims to £500, amounting to £18,500 on the footing that there were 37 individual applicants each of whom was entitled to £500.

Given that the actual wasted costs of the Applicants were quantified at only £6,012.60, those Applicants would make a substantial profit if they recovered £18,500 between them and such a profit would probably amount to a breach of the indemnity rule.

Counsel for the 3rd, 4th and 6th Respondents amended his application in like manner and sought to recover £1,185 between the three parties.

In the light of these amendments and the sums now claimed the 1st Respondent now takes a more robust approach to the claims and refutes them.

17. There is a debate as to whether the conduct of a party has to embrace all the characteristics set out in paragraph 10(2)(b) in order to engage the paragraph or whether it is enough that his conduct embraces one characteristic only. There are some conflicting authorities. The Applicants do not in their solicitors letter dated 12 March 2012 identify specific conduct or characteristic complained of. The letters of Mr Scardino and Mr Rossman do not add anything or assist on this point. In contrast in the asb law llp letter dated 7 March 2013 submitted on behalf of the 3rd, 4th and 6th Respondents expressly relies upon alleged disruptive and unreasonable conduct.

18. We have considered carefully the submissions made on behalf of the 1st Respondent and the outline of events leading up to 12 April 2012 and also statement of case in the reply served on behalf of the 3rd, 4th and 6th Respondents. There can be no doubt that the 1st Respondent was slow to get going and could and should have made more purposeful progress. It sought to rely overmuch on the 2nd Respondent and when it realised that it was not going to get the co-operation it sought, it had to press on on its own but had left it rather late. Whilst such dilatoriness is capable of criticism, and we do criticise it, we do not find that, in all of the circumstances outlined, it is so severe that it properly falls within the characteristics of conduct set out in paragraph 10(2)(b) of Schedule 12. As Mr Hammond put it (correctly in our judgment) in his submissions - paragraph 38.3 *"The threshold in paragraph 10 of Schedule 12 to CLRA 2002 is a high one and is not easily satisfied."*

19. We also bear in mind that even if the 1st Respondent had not made its section 36 application so late it seems us unlikely that the hearing set for 12 April 2012 would have been effective in any event. This is clear from the further directions that were given on that occasion. The case was not then ready for trial. The Applicants position had not been properly thought through and the precise nature of the variation sought changed and evolved as further time went on. Moreover not all parties were then clear about the full (and complex) leasehold structure at 3 & 4 Whitehall Court and the variety and different terms of the several business lettings and the implications for the service charge accounts. Thus the costs of the hearing on 12 April 2012 were not wholly wasted. Whilst we accept that the costs of preparing the trial bundles were wasted, at the substantive hearing in January 2013 the trial bundles were kindly prepared by the solicitors to the 1st Respondent and thus there was not duplication of this expense suffered by the Applicants.

20. For these reasons we decline to make an order under paragraph 10 of Schedule 12 and we have dismissed this part of the application.

21. In case it should be material we make the observation that if we had been minded to make an order it would have been limited to £500. We reject the submission that we should award £500 the Applicants as a body and not £500 to each individual Applicant. There are three reasons:

21.1 The Applicants acted in concert and as one with a common cause and with one common objective. Between them they had paid only one application fee and only one hearing fee.

21.2 The number of active or effective Applicants has changed over the course of these proceedings and we are not convinced that there were 37 active Applicants at the material time.

21.3 There was no information before as to how the costs of the hearing on 12 April 2012 had been shared amongst the Applicants.

21.4 A total award of £18,500 would have breached the indemnity rule.

The 3rd, 4th & 6th Respondents' application for costs

22. These Respondents also sought an order for costs under paragraph 10 of Schedule 12 to CLAR 2002, although they limit the claim to £1,158.

23. For the reasons set out above we have also dismissed this claim.

The 1st Respondent's application for costs

24. At a very late stage and in its statement of case in answer to the Applicants' and 3rd, 4th and 6th Respondents' application for the costs the 1st Respondent has included its application for costs. It claims the sum if £1.158. It also relies upon paragraph 10 of Schedule 12.

25. We are not wholly satisfied that this was a proper way to make an application under paragraph 10.

26. Whilst, in the event, we have rejected the claims made against the 1st Respondent for costs those claims were not wholly without merit. They were certainly arguable and there is no doubt that some aspects of the 1st Respondent's early handling of the application were open to a measure of valid criticism. We find that the applications whilst unsuccessful were properly and reasonably made. We do not find that the conduct of those making the applications fell within the characteristics of conduct set out in paragraph 10(2)(b) of Schedule 12. Equally, amending the applications to include larger sums was not of itself reprehensible, even though perhaps a little speculative and opportunistic.

27. For these reasons we have dismissed the 1st Respondent's application for costs.

The section 20C applications

28. We can take the two applications together.

29. There is disagreement between (most of) the lessees who participated in these proceedings and their immediate landlord, the 2nd Respondent, as to whether the leases, properly construed, permit the 2nd Respondent to pass through the service charge account all or some of the costs it has incurred or may incur in connection with these proceedings.

30. On a section 20C application we are not required to construe the lease on this point. The question for us is that if the lease does permit such costs to pass through the service charge account is it just and equitable in the circumstances that the landlord should not be entitled to pass all or some of them through the service charge account.

31. Section 20C is in these terms:

> "***20C.— 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 a 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 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."

32. The gist of the case for the Applicants was that that in allowing the contractually recoverable service charges to exceed 100%, it was culpable and responsible for getting it sorted out and onto a proper footing, and that it should bear the costs of doing so and not seek to pass them through the service account, even if, which was denied, the leases properly construed, permitted it to do so. They also adopted points made by asb law llp on behalf of the 3rd, 4th and 6th Respondents but the letter of 7 March 2013 does not really add much, if any substance. They say that the 2nd Respondent allowed an unsatisfactory service charge regime to develop and that it cannot be right that the lessees, as a body, should have to pay all or some of the 2nd Respondent's costs through the service charge. The letters from Mr Scardino and Mr Rossman are to similar effect.

33. It was not in material dispute that the 2nd Respondent had deliberately set up an unsatisfactory regime in the first place, it was something that had evolved over quite a period of time. Nor was it suggested that 2nd Respondent profited improperly from the current rebate scheme which it operated.

34. Whilst opposing the application in general the 2nd Respondent was rather neutral as to whether basis of sharing out the contributions should be changed or not.

35. The Applicants commenced the section 35 application. We have found that the application was misconceived and the variations sought were unworkable and introduced elements of unfairness to some lessees such that we declined to exercise our discretion to make an order to vary the leases. During the course of the hearing it was suggested that the Applicants were opportunistic in that the effect of the variation they sought would result in their proportions being decreased at the expense of others whose proportions would increase.

36. For the most part the 2nd Respondent dealt with the proceedings by engaging its experienced managing agents and it was not formally represented by counsel or solicitors. It may have incurred some legal costs on advice or guidance during the course of the hearing but it appears us to have kept its costs to a minimum. We find that it cannot

be said the approach taken by the 2nd Respondent and its conduct in these proceedings was disproportionate or extravagant.

37. We find that it was not disproportionate or inherently improper or unreasonable for the 2nd Respondent to have engaged in these proceedings brought by the Applicants which we have found were misconceived and without merit.

38. We take no view as to whether or not the leases, properly construed, allow the 2nd Respondent to pass its costs through the service charge account, but if the leases do so provide we see no reason to deprive the 2nd Respondent from doing so. There was nothing in the conduct of the 2nd Respondent during the course of these proceedings that would suggest to us it would just or equitable to deprive the 2nd Respondent from whatever contractual rights it may have under the leases in this regard.

39. Accordingly and for the reasons set out above we have dismissed the applications under section 20C LTA 1985.

40. Of course if the 2nd Respondent does seek to pass all or some of its costs of these proceedings through the service charge account, and if lessees do not consider that it is entitled to do so, when the accounts are issued, it will be open to all or any of the lessees to make an application under section 27A LTA 1985 with regard to the construction of the lease and/or whether it was reasonable to incur such costs and whether the costs sought to be recovered are reasonable in amount.

Judge John Hewitt
3 September 2013