

10293



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

**Case Reference** : **LON/00AJ/LSC/2013/0801**

**Property** : **Flat 57, Ealing Village, Hanger Lane, London W5 2NB**

**Applicant** : **Ealing Village Freehold Limited**

**Representative** : **John May Law (Solicitors)**

**Respondent** : **Mr Peter Thorneloe**

**Representative** : **In person**

**Type of Application** : **Costs under Rule 13 Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013**

**Tribunal Members** : **Mr Jeremy Donegan – Tribunal Judge**

**Date and venue of Paper Determination** : **09 May 2014  
10 Alfred Place, London WC1E 7LR**

**Date of Decision** : **14 May 2014**

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**DECISION**

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## **Decisions of the tribunal**

- (1) The tribunal refuses the application for an order in respect of costs under Rule 13 (1) (b) (ii) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (“the 2013 Rules”)

## **The application**

1. By a letter dated 10 May 2014, the Applicant’s solicitors (“JML”) applied for an order for costs (“the Costs Application”) incurred by the Applicant in defending an earlier application to the tribunal under case reference LON/00AJ/LSC/2013/0801 (“the Substantive Application”).
2. The Applicant is referred to as the Landlord throughout this decision and the Respondent is referred to as the Tenant.
3. The tribunal received the Costs Application on 12 March 2014 and issued directions on 14 March 2014. The directions provided that the Costs Application was suitable for a determination without an oral hearing, on the paper track. None of the parties has objected to this or requested an oral hearing.
4. The parties have each submitted statements of case relating to the Costs Application. The costs being claimed by the Landlord total £7,286 (including VAT). The application is opposed by the Tenant. The paper determination took place on 09 May 2014. In coming to its decision the Tribunal took account of the statements of case and correspondence submitted by the parties on both the Costs Application and the Substantive Application.
5. The relevant legal provisions are set out in the Appendix to this decision.

## **The background**

6. The Substantive Application related to 57 Ealing Village, Hanger Lane, London W5 2NR (“the Flat”) and was pursued by the Tenant in person.
7. The Tenant holds a long lease of the Flat, which forms part of Ealing Village. The Landlord is the freehold owner of Ealing Village, an estate of 132 flats spread between five blocks and two gatehouses, 61 garages and various other facilities.
8. The lease of the Flat requires the Landlord to provide services and the Tenant to contribute towards their costs by way of a variable service charge.

9. The Substantive Application was made under section 27A of the Landlord and Tenant Act 1985 (“the 1985 Act”) and was received by the tribunal on 20 November 2013. In that application the Tenant sought determinations of the service charges for the Flat for the years ending December 2014, 2015, 2016, 2017 and 2018.
10. The Substantive Application was concerned with the proposed replacement of windows in the Flat and in the other flats at Ealing Village. Within the application form the Tenant asked the tribunal to decide the following issues, for each of the service charge years:
  - 1) *As the Leaseholder and the son in law of Mrs E Coelho deceased 11/8/1997 I own the windows of Flat 57 Ealing Village, London W5 2NB as written in the 999 year lease dated 25/8/1982 copy enclosed.*
  - 2) *Ealing Village Freehold Limited (ENFL) have no authority to force me to replace the existing single glazed windows which do not require replacement with double glazed windows or maintenance*
  - 3) *My lease does not specify that I am responsible for the replacement of windows in the other 131 Flats of Ealing Village*
  - 4) *ENFL are responsible for the maintenance of the common parts of Ealing Village as stated in the Lease*
11. Within the application form, the Tenant also sought an order under section 20C of the 1985 Act.
12. Paragraphs 9 to 23 below deal with the procedural history of the Substantive Application.
13. A case management hearing took place on 19 December 2013 when directions were given by Judge Mohabir. Mr May of JML appeared on behalf of the Landlord. The Tenant did not appear and was not represented. On 09 December 2013 he sent an email to the tribunal stating that he would be abroad from 01 December 2013 until 03 March 2014 and asking that the CMC be adjourned. That request was refused.
14. At the CMC Judge Mohabir concluded that the tribunal had no jurisdiction to determine the service charges for the years ending December 2015-2018, as the service charge costs for those years were not yet known. The application, insofar as it related to those years, was treated as having been withdrawn.
15. The directions provided that Tenant should serve his statement of case by 27 January 2014 and the Landlord should serve his statement of case by 17 February 2014. Directions were also given for disclosure,

exchange of witness statements and the filing of hearing bundles. The full hearing was listed for 14 and 15 April 2014.

16. On 20 January 2014 the Tenant sent a letter and various documents to JML, by email. At that time the Tenant was in Australia. The letter gave brief details of the Tenant's case. JML wrote to the Tenant on the same day, stating that they would read the letter and documents as his statement of case unless they heard to the contrary by 27 January 2014.
17. On 17 February 2014 JML sent the Landlord's statement of case to the tribunal and the Tenant. Paragraph 4 of that statement of case is set out below:

*All of the flats at Ealing Village were let by the Respondent's predecessor in title on materially identical Leases, including that of the Applicant's flat. The issues raised in the Applicant's application to the Tribunal apply equally to all of the other flats at Ealing Village and at the pre-trial review held on 19<sup>th</sup> December 2013 before Judge I. Mohabir the Respondent requested the Tribunal to consider this application in relation to all of the flats at Ealing Village and not simply that belonging to the Applicant. Judge Mohabir accepted this request and agreed that it would be inappropriate for the Respondent to issue its own application to the Tribunal to determine matters relating to service charges for the year ending 23<sup>rd</sup> December 2014 and, to the extent that this falls within the jurisdiction of the Tribunal, subsequent years.*

18. In a letter dated 21 February 2014 the Tenant asked the tribunal “..to dismiss the Respondent's Statement of Case..” upon the basis that he did not receive this until 19 February 2014. JML provided written representations in a letter to the tribunal dated 24 February 2014. They also wrote to the Tenant on that date, inviting him to contact them to discuss disclosure and the case generally.
19. The Tenant's application to strike out the Landlord's statement of case was refused by the tribunal, upon the basis that there was no prejudice and the parties were informed of this in a letter dated 26 February 2014.
20. In a separate letter dated 26 February 2014, the tribunal wrote to JML pointing out that the Substantive Application related solely to the Flat. The tribunal also directed the Landlord to serve an amended statement of case by 06 March 2014, which should “..remove the reference to all the other lessees being considered as part of this application and the last sentence of paragraph 4 of the statement of case”.
21. On 02 March 2014 the Tenant wrote to the tribunal, asking that the Substantive Application be withdrawn. That letter set out the

background to the matter in some detail and referred to the Tenant's financial and personal circumstances. It also set out the grounds on which the application was being withdrawn. In brief the Tenant did not want the outcome of the application to bind the other 131 flats at Ealing Village.

22. JML wrote to the tribunal and the Tenant on 05 March 2014, effectively objecting to the withdrawal of the Substantive Application. They pointed out that the issues to be determined had a bearing on the other 131 flats and that if the application was withdrawn then the Landlord would need to make its own application to the tribunal to determine these issues.
23. The Tenant sent a further letter to the tribunal on 05 March 2014, in which he reiterated the request to withdraw the Substantive Application. He also asked for the return of the £190 fee that he had paid for the full hearing.
24. On 06 March 2014, JML sent copies of the Landlord's amended statement of case to the Tenant and the tribunal. In their covering letter to the tribunal they acknowledged that Judge Mohabir had not directed that the Tenant's application was to relate to the other flats at Ealing Village. The letter states "*..what was agreed was that a decision in relation to Mr Thorneloe's application would be considered by the Tribunal to represent res judicata in relation to the same issues on other flats..*". It goes on to say that the Judge expressed the view, in passing, that there was no need for the Landlord to make a separate application for the other flats.
25. On 07 March 2014 the tribunal consented to the withdrawal of the Substantive Application.

### **Submissions**

26. The Landlord contends that the Tenant's conduct of the Substantive Application was unreasonable. In its statement of case dated 27 March 2014 it makes no criticism of the Tenant for having made the Substantive Application but complains of various matters, which are summarised below:
  - 26.1 The Tenant knew that the Landlord intended to make its own application to the tribunal, to determine the same issues, when he submitted the Substantive Application;
  - 26.2 The Tenant gave no advance warning to the Landlord before making the Substantive Application, which was issued shortly before he departed on an "*..extended holiday in Australia..*";

- 26.3 The Tenant's statement of case from the Substantive Application was inadequate, meaning that the Landlord had to set out the history of the matter in its statement of case;
  - 26.4 The Tenant failed to provide JML with proper contact details in Australia, meaning that attempts to communicate with him were unsuccessful;
  - 26.5 The Tenant returned from Australia earlier than 03 March 2014 but failed to notify JML or the tribunal of this;
  - 26.6 The Tenants application to strike out the Landlord's statement of case was his only effort to participate in the substantive Application after he submitted his statement of case;
  - 26.7 The Tenant failed to respond to JML's letter of 24 February 2014, inviting him to work in a constructive way to prepare the Substantive Application for the full hearing;
  - 26.8 The Landlord was obliged to meet with its professional advisers to prepare for disclosure of documents, which was due by 10 March 2014;
  - 26.9 The Tenant's letter to the tribunal of 02 March 2014 made a number of incorrect and inaccurate comments about the parties conduct of the Substantive Application;
  - 26.10 It was unreasonable for the Tenant to issue the Substantive Application shortly before leaving on long overseas travels, without making provision for solicitors or other representatives to deal with the matter in his absence;
  - 26.11 It was unreasonable for the Tenant to fail to engage in any contact with JML, both during his travels on his return to the UK; and
  - 26.12 The Tenant tried to persuade the tribunal that the Landlord should be denied the opportunity to deal with the case in a proper manner, when making his unsuccessful application to strike out the statement of case. The statement of case was sent to the Tenant's postal address on 17 February 2014. At that time JML had no email address for him and were unaware that he had returned from Australia.
27. The Tenant's statement of case was contained in a letter to the tribunal dated 11 April 2014. Again he set out the background to the Substantive Application and explains that he tried to resolve the issue by

correspondence, before issuing the application. The Tenant also made various criticisms of the Respondent's agents and JML. He contends that he was obliged to lodge on 20 November 2013 because the agents had failed to respond to requests for information and he knew that increased service charges would be demanded after he left for Australia. The matter could not wait until he returned to the UK. The purpose of the Tenant's trip to Australia was not to take an extended holiday. Rather he was travelling there to look after his grandchildren, whilst his son recovered from an operation.

28. The Tenant also challenges many of the criticisms made in the Landlord's statement of case and disputes the amount of JML's charges. He also asks the tribunal to make a section 20C order so that none of the Landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge, stating "*I do not wish the Applicant to put any of their fees on the service charge*".
29. Brief additional representations were made in letters from JML and the Tenant dated 25 April and 01 May 2014, respectively. They correctly point out that the application for a section 20C order was made within the Substantive Application and has been withdrawn.
30. Having studied the submissions from the parties and considered all of the documents provided, the tribunal has made the following determination.

### **The tribunal's decision**

31. The Landlord's application for an order for costs is refused.

### **Reasons for the tribunal's decision**

32. The starting point is to consider the tribunal's power to make a costs order under Rule 13 (i) (b) (ii) of the 2013 Rules. It may make such an order only "*if a person has acted unreasonably in bringing, defending or conducting proceedings*". This power is discretionary and the wording makes it clear an order can only be made if a person's **conduct** of the proceedings is unreasonable (in bringing, defending or conducting the proceedings), rather than his behaviour generally. It is for the Landlord to prove unreasonable conduct, which is a high threshold.
33. The Landlord, quite correctly, does not criticise the Tenant for beginning the proceeding (by issuing the Substantive Application). Rather his criticisms relates to the Tenant's conduct of the proceedings.
34. The tribunal rejects the suggestion that the Tenant acted unreasonably in issuing the application shortly before he travelled to Australia.

Whilst it is not ideal, it is perfectly possible for a party to conduct a case before the tribunal whilst overseas provided that they are readily contactable and attend or are represented at any final, oral hearing. The Tenant was in regular contact with the tribunal whilst he was in Australia and was still able to comply with the directions.

35. The tribunal then considered whether the Tenant's conduct of the proceedings was unreasonable and looked at this with reference to two time periods. Firstly there was the period from 20 November 2013, when the application was issued, until 24 February 2014, being the date that he asked the tribunal to strike out the Landlord's statement of case
36. The tribunal concluded that there was no unreasonable conduct by the Tenant during this period. Although he did not attend the CMC he notified the tribunal of this, in advance. After receiving the directions he served his statement of case, in time.
37. The Tenant's statement of case was brief but served its purpose. It was clear from the original application and the additional documents served on 20 January 2014 that the Tenant was asking the tribunal to determine who was responsible for the proposed replacement of the windows in the Flat and elsewhere at Ealing Village. As he has pointed out, this was a relatively straightforward issue that would turn upon the wording of his lease. There was no need to produce a lengthy statement of case, reciting the history at Ealing Village.
38. It appears that there was a period of approximately four weeks, between service of the two statements of case (20 January to 19 February 2014), when JMS struggled to contact the Tenant. However any failure to supply them with up to date contact details, during this period, does not amount to unreasonable conduct. By this stage the Tenant had already served his statement of case. Disclosure was not due until 10 March. It follows that there were no procedural steps for the Tenant to take within this four-week period.
39. The Tenant did not act unreasonably in requesting that the Landlord's original statement of case be struck out, given that the document was served two days late.
40. It follows that the Tenant's conduct of the proceedings up until 24 February 2014 was not unreasonable.
41. The tribunal then considered the period from 25 February to 07 March 2014, when the tribunal consented to the withdrawal of the Substantive Application.
42. The tribunal does not accept that the Tenant's failure to contact JML following receipt of their letter of 24 February 2014 was unreasonable,



bearing in mind that his request to withdraw the Substantive Application was made only 6 days later.

43. The tribunal then considered whether the withdrawal of the Substantive Application amounted to unreasonable conduct. The mere act of withdrawing a tribunal application is not automatically unreasonable. Rather one needs to look at the circumstances in which the application is withdrawn, including the reasons for the withdrawal and the timing.
44. The Tenant's decision to withdraw the application appears to flow from a misunderstanding at the CMC. Mr May attended the CMC on behalf of the Landlord and came away with the impression that a separate application (for the other 371 flats) was unnecessary, based on a passing comment made by Judge Mohabir. This impression was incorrect. Had the Substantive Application not been withdrawn then the tribunal's determination would only have bound the Landlord and the Tenant. It would not have bound the leaseholders of the other flats, as they were not parties to that application. It follows that a separate application was always needed to achieve a binding decision for those flats.
45. The directions issued at the CMC make no reference to joining the other leaseholders to the Substantive Application. To the contrary the only parties named were the Landlord and the Tenant. If there was any confusion, as to the comment made by Judge Mohabir then Mr May should have sought clarification when he received the directions. Furthermore the Tenant cannot be held responsible for any confusion given that he did not attend the CMC.
46. The Tenant requested the withdrawal of the Substantive Application in his letter to the tribunal dated 02 March 2014. This was only 9 days after he received the Landlord's original statement of case and before he received their amended statement of case. It appears that the withdrawal was prompted by paragraph 4 of the original statement of case in that the Tenant was under the mistaken belief that the outcome of his application would bind all 372 flats. Clearly this was incorrect and this paragraph was subsequently deleted in the amended statement of case, at the tribunal's direction.
47. The request to withdraw the application was made shortly after the Tenant received the original statement of case and approximately six weeks before the full hearing. This was the first time that the Landlord had responded, in writing, to the Substantive Application. Until this time the Tenant did not know the Landlord's grounds of opposition. Further the contents led him to the mistaken belief that the outcome of his application would bind all flats at Ealing Village. In the circumstances the Tenant's decision to withdraw the application was unsurprising and was not unreasonable.

48. The application was withdrawn promptly, after the original statement of case was served. The tribunal is satisfied that there was no unreasonable conduct by the Tenant during the period 25 February to 07 March 2014.
49. Given the findings set out above, it follows that the Tenant's conduct of the proceedings was NOT unreasonable. This means that the tribunal has no power to make an order for costs against the Tenant and does not need to consider whether to exercise its discretion. Further there is no need for the tribunal to consider or determine the amount of the costs being claimed by the Landlord.

### **Application under Section 20C**

50. The tribunal has no jurisdiction to make a section 20C order in relation to the Substantive Application, given that the Substantive Application has been withdrawn. It follows that, subject to the wording of the leases, the Landlord may pass its costs of the Substantive Application through the service charge for the Building. There was no application for a section 20C order in respect of the Costs Application.

**Name:** Jeremy Donegan

**Date:** 14 May 2014

## **Appendix of relevant legislation**

### **Landlord and Tenant Act 1985 (as amended)**

#### **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 appropriate 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;
  - (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.

### **The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**

#### **Rule 13 (1)**

The Tribunal may make an order in respect of costs only –

- (a) under section 29 (4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
- (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in –
  - (i) an agricultural and land drainage case,
  - (ii) a residential property case, or
  - (iii) a leasehold case; or
- (c) in a land registration case.