12693

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/30UE/LSC/2017/0056**
Property	:	**36,38,40,48 and 50 Marine Crescent, Buckshaw Village, Chorley, Lancashire. PR7 7AP**
Applicant	:	**Kearsley Investments Limited and others (see Schedule)**
Representative	:	**Managing Estates Limited t/as Estates Property Management**
Respondent	:	**Runshaw Management Company Limited**
Representative	:	**Womble Bond Dickinson (UK) LLP Solicitors (ref: JS/PAJ3/452434.1)**
Type of Application	:	**Landlord and Tenant Act 1985 – s 27A and s20C ("the Act")**
Tribunal Members	:	**Judge Geoffrey Freeman** **J Faulkner FRICS Expert Valuer Member**
Date of Determination	:	**1 March 2018**
Date of Decision	:	**14 March 2018**

DECISION

DECISION

1. **The sums incurred for legal costs and claimed as service charge for the years 2016 and 2017 are not payable by the Applicants.**

2. **The Tribunal has no power to award the costs of this application as being payable by the Applicants.**

3. **No part of the Respondent's costs incurred in connection with the Application are to be included in the service charge payable by the Applicants for the period which is the subject of the application.**

PRELIMINARY

1. The Tribunal has received an application for a determination as to whether service charges in respect of the Property are payable and/or reasonable. The application concerns the service charge years 2016 and 2017. Only one item of expenditure is disputed. It is the Respondent's costs and expenses incurred in dealing with an application made by Marine Crescent RTM Company Limited in connection with an application to manage the Property and other property under the Commonhold and Leasehold Reform Act 2002 ("CLARA"). The Applicants dispute both the amount of such costs and the manner of their apportionment under the terms of the Leases of the Property.

2. Both parties requested, and the Tribunal considered it appropriate, for the application to be determined on the papers provided by the parties without holding a hearing.

3. The Tribunal issued further Directions to both parties dated 13th November 2017. The Directions were intended to clarify the issues involved in the case. The Tribunal determined that an inspection was not necessary.

THE FACTS

4. The Application arises out of the issuing of invoices by the Respondent's Managing Agents, RMG Limited, for costs incurred by the Respondent arising out of an application for the right to manage the Development known as 36 – 50 (even numbers only) Marine Crescent, Buckshaw Village, Chorley, Pr7 7AP ("the Flats"). The Flats consist of a purpose built, standalone, block of 8 flats, 6 of which share a communal entrance and the remaining 2 of which have separate entrances. The Flats form part of a larger estate ("the Estate") of houses and flats built by Barratt Homes Limited at the beginning of this millennium in Buckshaw Village, outside Chorley, Lancashire.

5. It is not disputed that the Respondent was formed to manage the Flats and joined in the leases to covenant for the repair and maintenance of the Flats and to contribute to the upkeep of the communal parts of the Estate.

6. Following completion of construction of the Estate, one would have expected the Directors of the Respondent, who had apparently been nominated by Barratt Homes Limited, to retire, and for shares to be issued to the respective flat owners, so they could take over the running of the Flats. This did not happen, for reasons which are unclear and which have no bearing on this decision.

7. There have been previous proceedings before the Tribunal between the parties under Case Number MAN/OOBM/LCP/2016/0003. This case arose as a result of an application relating to (No Fault) Right to Manage made by the Applicants in respect of Marine Crescent RTM Company Limited. That application was opposed but such opposition was subsequently withdrawn by the Respondent. In that case the Tribunal decided that the Respondent's costs in connection with that application, payable under section 88 of the Commonhold and Leasehold Reform Act 2002, were £1824.70.

THE APPLICANTS' CASE

8. The Applicants argue that the amounts sought by the Respondent are not chargeable under the Lease because they do not fall within the ambit of expenses recoverable under the Eighth Schedule. They cited in support the decision of the Upper Tribunal (Lands Chamber) in *Sinclair Gardens Investments (Kensington) Limited v Avon Estates (London) Limited* [2013] UKUT 0317 (LC) UTLC Case Number LRX/125/2015 ("Sinclair").

9. In addition to the amount challenged by the Applicants, they also challenged the apportionment of the sums alleged to be payable. The Lease provides for the service charge to be apportioned between owners and sets out the apportionment percentages. The Respondent admitted that it had not apportioned the amount in accordance with the Lease but they had had to apportion the amount in the manner stated so as to recover the amount in full.

THE RESPONDENT'S CASE

10. It is not clear from the Respondent's Statement of Case filed in response to the Directions dated 13th November 2017, what precisely is claimed by way of service charge in relation to the sums in dispute.

11. From the Applicant's Statement of Case, also filed pursuant to the above Directions, it appears to be £4673 debited to the 2016 accounts. Following this, the sum of £1930.20 appears from the statement to have been debited in the 2017 accounts. This totals £6603.20. Confusingly, at paragraph 11 of the Respondent's statement it is stated

that the actual sum alleged to be owing is higher. This is because "...the latter figure [£4673] was based on accruals made in the year for the expected costs. Not all the invoices had reached the managing agent's system before the accounts were closed for the year and hence the final accounts were based upon the accruals."

12. As a result of the above it appears to the Tribunal that the Respondent seeks payment of £4175.20 for the 2016 accounting year, with the balance being carried forward to the subsequent year. Unfortunately the Respondent has not particularized this balance. Nevertheless, the Respondent avers at paragraph 5 that "All solicitors' costs have arisen in connection with the Respondent's management of the block and it is therefore clear that the Applicants are obliged to pay the Respondent's legal costs. It is further argued that it was reasonable and proportionate for the respondent to instruct solicitors with specialist knowledge to review and advise on the issue".

13. When asked by the Applicants on 17th March 2017 what the sum of £4673 represented, the Respondent, by its agents, responded that the sum of £4172.80 was the fees of Respondent' solicitors and £500 was the fees of the Respondent's managing agents. Subsequently, the Respondent confirmed, at paragraph 9 of its statement of case, that the managing agents would not charge this fee.

14. The Applicants allege (at paragraph 16 of their undated Statement) that the sums involved are:-

"£1878.70 payable by the RTM Company
£4673 via the 2016 service charge and supplementary [sic] invoiced to the leaseholders
£1930.20 via the 2017 service charge and supplementary [sic] invoiced to the leaseholders"

THE LEASE

15. Copies of all the relevant leases were provided to the Tribunal. All are in substantially the same form. It is not disputed that all provide for a service charge to be paid to the Respondent, in return for the Respondent managing the Flats.

16. Each owner is obliged amongst other expenses, to contribute to "the Building Service Costs" These are set out in full in the Eighth Schedule and include:-

> *"7. The cost of taking all steps deemed desirable or expedient by the Company for complying with making representation against or otherwise contesting the incidence of the provisions of any legislation or orders of statutory requirements thereunder concerning town planning public health highways streets drainage or other matters relating to or alleged to relate to the Block for which the Lessee is not directly liable hereunder*

. . .

9. *All fees charges expenses and commissions payable to any solicitor accountant surveyor or architect whom the Company may from time to time employ in connection with the management and/or maintenance of the Block.*

10. *Value Added Tax on any of the above items"*

THE LAW

17. The Law is set out in the Appendix.

DISCUSSION

18. The Tribunal first considered the sum of £1878.70 referred to in paragraph 14 above. The Tribunal determined that it is not service charge. It is payable as a result of section 88 of CLARA. Even were it regarded as service charge, it does not fall to be determined by this Tribunal since it falls within section 27(4)(c) of the Act, as having been the subject of a determination by the Court. It is worth noting that section 89 (3) of CLARA provides that each person who is or has been a member of the RTM company is also liable for such costs jointly and severally with the RTM company and each other person who is so liable.

19. The Tribunal then considered the remaining sums claimed as service charge. These comprise legal costs incurred by the Respondent's solicitors who were, quite properly in the Tribunal's view, instructed in connection with the application by the RTM company to take over management of the Flats. Quite what else they were instructed on was not made clear to the Tribunal, it being referred to vaguely as "All solicitors' costs have arisen in connection with the Respondent's management of the block . . ." (paragraph 12 above).

20. The Tribunal examined the invoices rendered by the solicitors produced following the issue of Further Directions. It is clear to the Tribunal that such invoices related to work done in connection with the RTM claim. All the invoices produced, dated 1 June 2016, 30 June 2016, 30th August 2016, 30 November 2016, and 27th April clearly state: "Matter: RTM Claim re 36 – 50 (Evens) Marine Crescent, Buckshaw Village, Chorley, PR7 7AP". In the absence of any evidence contradicting this, the Tribunal felt entitled to conclude that all work carried out by the Respondent's solicitors related to this matter and therefore fell within the claim under section 88 of CLARA which has already been determined by the Tribunal.

21. For completeness, the Tribunal also considered whether such costs could fall within the definition of service charge under the Eighth Schedule of the lease. In this respect they were referred to the decision in Sinclair above.

22. The Tribunal noted that, in Sinclair, whether a landlord is entitled to recover legal costs incurred in relation to tribunal proceedings against its tenants depends upon the true construction of the service charge clause in the lease [para 20]. Each case is fact specific. The leading case quoted in Sinclair, is *Arnold v Britton* [2015 UKSC 36] where Lord Neuberger stated:-

"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean' to quote Lord Hoffman in *Chartbrook Ltd v Persimmon Homes Ltd [2009 Ac 1101 at [14]"*

23. The Tribunal also noted, at [22]

"There is no need to construe service charge clauses restrictively . . . That said 'it is reasonable to expect that, if the parties to a lease intend that the lessor shall be entitled to receive payment from the tenant in addition to the rent, that obligation and its extent will be clearly spelled out in the lease': see *Francis v Phillips* [2014] EWCA Civ 1395 at [74] *per* Sir Terence Etherton C. The court or tribunal should not therefore (as stated by Rix LJ in *McHale v Earl Cadogan* [2010] EWCA Civ 14, [2010] 1 EGLR 51 at [17] 'bring within the general words of a service charge clause anything which clearly does not belong there'. This approach underlies one of the earliest decisions on the recovery of litigation costs pursuant to a service charge clause where Taylor LJ required 'clear and unambiguous terms' before he would permit a landlord to claim the legal costs of proceedings against defaulting tenants from another tenant who had paid his rent and service charges in compliance with the terms of his lease: see *Sella House Ltd v Mears* [1989] 1EGLR 65"

24. Applying the above test to the Eighth Schedule of the Lease, it is clear that clause 7 applies to matters concerning town planning public health highways streets drainage or other matters relating to or alleged to relate to the Block for which the Lessee is not directly liable hereunder. There was no evidence before the Tribunal that the costs incurred by the Respondent's solicitors related to such matters, or to matters ancillary to that expenditure. The Tribunal concluded that such clause could not be used to bring the expenditure with this head of charge, since it had not been clearly spelled out.

25. The Tribunal then considered whether such costs consisted of fees charges expenses and commissions payable to any solicitor accountant surveyor or architect whom the Company may from time to time employ in connection with the management and/or maintenance of the Block (clause 9 of the Eighth Schedule).

26. As has been seen above (paragraph 20), the Tribunal has already concluded that the costs sought by way of service charge have already been the subject of a previous application. In addition, no evidence was put before the Tribunal that other work, not in connection with the RTM application, has been carried out by the Respondent's solicitors. The Tribunal conclude that such costs have not been reasonably incurred by the Respondent and are therefore not to be included in the Service Charge Accounts for the relevant years.

27. As a consequence of the conclusion reached above, it was not necessary for the Tribunal to consider the apportionment of the service charge and they refrained from doing so.

COSTS OF APPLICATION

28. The Respondent claims the costs of the application and submitted a statement of these. The amount claimed is £3501.

29. The Tribunal's powers to award costs are governed by rule 13 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013. The general principle (set out in rule 13(1)(b)) is that the Tribunal may only make an order in respect of costs if a person has acted unreasonably in bringing, defending or conducting proceedings before the tribunal.

30. The Tribunal noted that no such allegations have been made by the Respondent. They have alleged that "it is not clear why the Applicants chose to make the present application rather than engage further with the Respondent's representatives after receiving this clarification. The decision to make the application has led to all parties incurring further unnecessary costs in dealing with the matter." The Tribunal supposed this to be an implied allegation of unreasonableness.

31. The Tribunal considered that it is for the Applicants to decide how to conduct their case against the Respondent. They have been successful. The Tribunal did not consider they have acted unreasonably. The Tribunal therefore concluded that it had no power to make a costs order in these proceedings and the Respondent's application is accordingly refused.

SECTION 20C APPLICATION

32. Section 20C provides:-

(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 or the First-tier Tribunal (Property Chamber) 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-

.....

(b) in the case of proceedings before a First-tier Tribunal (Property Chamber) to the Tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded to any First-tier Tribunal (Property Chamber)

33. The Tribunal noted that the Applicants have succeeded in their application. No representations were made by the Respondents on this aspect of the case other than at paragraph 22 of their statement of case in which they averred that they should be awarded their costs.

34. In the light of the above the Tribunal concluded that there were no good reasons for not making such an order and, in consequence, did so.

Appendix

The Law

Section 18 of the Landlord and Tenant Act 1985 ("the 1985 Act") provides:

(1) In the following provisions of this Act "service charge" means" an amount payable by a tenant of a dwelling as part of or in addition to the rent –

(a) which is payable directly or indirectly , for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose-

(a) "costs" includes overheads, and
(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.
Section 19 provides that

(1) relevant costs shall be taken into account in determining the amount of a service charge payable for a period –
(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provision of services or the carrying out of works only if the services or works are of a reasonable standard:

and the amount payable shall be limited accordingly.

Section 27A provides that

(1) an application may be made to a First-Tier Tribunal (Property Chamber) for a determination whether a service 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 date at or by which it is payable, and
(d) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) ....

(4) No application under subsection (1)...may be made in respect of a matter which –
(a) has been agreed by the tenant.....

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

Judge Freeman
14 March 2018

The Schedule

List of Applicants

Kearsley Investments Limited	36 Marine Crescent
Philip Walmsley	38 Marine Crescent
Nina Lewis	40 Marine Crescent
Andrew Robert Boothroyd	48 Marine Crescent
Edward Robinson Sulley	50 Marine Crescent