

**IN THE LEASEHOLD VALUATION TRIBUNAL
UNDER THE LANDLORD & TENANT ACT 1985 S27A**

DECISION AND REASONS

Case reference	CHI/00ML/LSC/2008/008
Property	77A Wilbury Crescent Hove East Sussex
Applicant	Ms I Paulsen, Tenant, Flat A
Respondent	Mr H Duddy & Miss K Glyde, Landlords
Tribunal members	Ms H Clarke (Chair) (Barrister) Mr J N Cleverton FRICS Mr T W Sennett MA MCIEH
Date of hearing	29 April 2008
Date of decision	7 May 2008

1. APPLICATION

The Applicant sought a determination by the Tribunal that she was not liable to pay certain sums by way of service charges for the year ending 23 June 2008.

2. At a pre-trial review on 27 February 2008 it was established that the issues for determination were whether the Applicant was liable to pay the sum of £1700 plus VAT consisting of legal costs incurred by the Respondents and the sum of £510.95 representing interest on previous service charge demands.

3. At the hearing the figures were adjusted and the Respondent sought payment of costs of £1969.50 plus VAT and £395.08 interest.

4. The Applicant also sought an order under s20C Landlord & Tenant Act 1985 that the Respondent's costs of the proceedings were not to be regarded as relevant costs for the purposes of the service charge. At the hearing she made an oral application for an order that the fees she had paid for the application should be reimbursed to her.

5. DECISION

The Tribunal determined that it did have jurisdiction to deal with the application.

6. The Tribunal determined that interest in the sum of £301 would be payable by the Applicant by way of service charges when demanded in accordance with the terms of the Lease and statutory law.
7. The Tribunal further determined that the sum of £1117.15 would be payable as service charges in respect of legal costs of which the Applicant's contribution would be £558.58 when demanded in accordance with the terms of the Lease and statutory law.
8. The Tribunal ordered that the sum of £100 be reimbursed by the Respondents to the Applicant in respect of the application fees paid by her. The parties may consider it appropriate that this sum be set off against the sums to be demanded from the Applicant.

9. THE LAW

Section 27A Landlord & Tenant Act 1985:

"Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.."

10. Section 19 Landlord & Tenant Act 1985:

"(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,"

11. The Leasehold Valuation Tribunals (Fees)(England) Regulations 2003 SI 2003 No. 2098 Regulation 9:

"(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings"

12. s20C Landlord & Tenant Act 1985 provides:

"(1) A tenant may make an application for an order that all or any of the costs incurred,...by the landlord in connection with proceedings before a .. leasehold valuation tribunal, ... 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

...

(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".

13. THE LEASE

A copy of the previous Lease dated 18 December 1974 and a Deed of Surrender and Regrant dated 11 June 2002 was produced. The relevant sections of the Lease as amended and regranted in 2002 provided for the tenant to pay a service charge

calculated at one half of the costs incurred by the landlord of complying with his covenants including the maintenance, exterior decoration and repair, and insurance of the Building. There was provision for a payment on account to be demanded on 24 June and 25 December of each year. The Lease also provided that the tenant shall pay for:

“the proper fees salaries and expenses payable to any Managing Agent surveyor solicitor or accountant whom the Lessor may employ for the purpose of carrying out the obligations of the Lessor under the Sixth Schedule hereto”

and

“...interest at the rate of 4 per centum per annum above the base rate for the time being of National Westminster Bank plc ...on any sum of money due from the Lessor to the Lessee under the provisions of this Lease..” if unpaid for 21 days after becoming due.

14. INSPECTION

The Tribunal inspected the building containing the flat in question immediately before the hearing, but did not inspect the interior of either flat. The building comprised a converted terraced house constructed in the early 20th century which appeared to be in generally reasonable condition, containing 2 flats. There was a small shared hallway and a garden to front and rear. To the front of the property the external decorations were in need of renewal.

15. THE HEARING

Both parties in person attended a pre-trial review at which directions were given for the filing of evidence and submissions by both parties. Directions were given for an oral hearing at which the Applicant Ms Paulsen and the Respondent Mr Duddy attended in person. Ms Glyde the second Respondent was unable to attend. Ms Paulsen was accompanied by Mr Lloyd. Both parties submitted a bundle of documents following the Tribunal's directions and made oral submissions to the Tribunal at hearing.

16. The Tribunal also had before it a copy of a previous LVT decision made between the same parties in November 2007 on the application of Ms Paulsen. That decision concerned various service charge items. For the purposes of the present application it was relevant that the previous LVT determined that it was reasonable for the Respondents to seek the sum of £4500 by way of payment on account of major works as demanded in November 2006. Ms Paulsen was not liable to pay an additional sum of £640.38 in respect of works to a balcony because the balcony was part of her demise. The previous LVT was asked by Ms Paulsen to make an order under s20C in respect of the Respondents' costs of those proceedings, but refused to make such an order.

17. THE ISSUE ON JURISDICTION

The Respondents initially wished to claim the total amount of legal costs incurred by them in respect of county court proceedings brought against the Applicant, and referred to a clause in the lease which dealt with costs incurred in relation to s146 Law of Property Act 1925. It was the Respondent's case that such costs did not constitute service charges but a debt for which the Applicant was wholly liable. The Tribunal questioned Mr Duddy on this matter and adjourned for a short period to allow him to consider the position.

18. Following the short adjournment Mr Duddy put his case on the basis that the legal costs were recoverable as service charges. He relied on the Eighth Schedule to the Lease as regranted, the relevant part of which is set out above. Ms Paulsen did not make submissions in regard to jurisdiction, save to say that the matter had been drawn to the Respondents' attention at the pre-trial review.
19. The Tribunal agreed that Mr Duddy may put his case on the revised basis and determined that it had jurisdiction to deal with the legal costs as service charges.

20. EVIDENCE AND SUBMISSIONS

THE CLAIM FOR INTEREST

Mr Duddy on behalf of the Respondents said that in November 2006 the Applicant was sent a demand for service charges which included the sum of £5140.38 for major works to the exterior of the property. That sum was not paid. The Respondents instructed local solicitors Dean Wilson Laing who issued a claim in Brighton County Court to recover the sum due, as a result of which the Applicant's mortgage company paid the sum claimed. The money so paid was held by the Respondents' solicitors on account and was subsequently returned to the mortgage company. The Applicant herself did not make payment until 7 January 2008 at which time she sent a cheque for £4500. Although that cheque was returned to the Applicant, the Respondents now accepted that to have been the sum due.

21. Under the Lease the Respondents claimed to be entitled to interest at 9.5% being 4% above base rate for the period from 25 December 2006, being 21 days after the service charge demand was sent, until 7 January 2008. From that a period of 99 days was claimed not at the penal rate of 9.5% but only at base rate of 5.5% to reflect the fact that the money was being held from the Applicant's mortgage company. The interest actually earned on that period was later sent back to the mortgage company.
22. The Applicant said that the Lease provided for interim payment to be made on 24 June and 25 December. The demand dated November 2006 therefore did not become payable until 25 December and interest on it would not arise until 21 days later. That demand was incorrect because it included the amount in respect of balcony works. Since that date she had never been given a correct service charge demand, nor a summary of her rights in accordance with s21B Landlord & Tenant Act 1985. The Applicant herself was out of pocket because she had to pay additional mortgage interest and charges due to the payment sent to the Respondents. She was prepared to concede for the purposes of the hearing that 9.5% was the correct rate.

23. REASONS FOR DECISION

The Tribunal considered the Lease and agreed with the Applicant's submissions that payment on account was not due until 25 December, and interest would not start to run until 21 days later. However the Tribunal found on the evidence that the sum of £4500 later confirmed by the LVT to be payable by the Applicant was properly demanded in November 2006 even though the demand also sought additional sums for the balcony. The interest clause under the Lease provided that interest would accrue for the period when the sums due 'were not paid'. The Tribunal took the view that whilst the Respondents held money from the Applicant's mortgage lenders on account, the sum due from her could not be said

to be unpaid, as the clause did not require that the Applicant herself had paid the sum due. Consequently the Respondents were not entitled to levy interest on the sum due for the period of 99 days during which their solicitors held the money. The Applicant had herself paid interest to her mortgage lender for this period in respect of the same amount of money, which indicated that the question of interest was between the Applicant and her lender. The rate of 9.5% was not disputed. The Tribunal therefore found that interest was due on the sum of £4500 at the rate of 9.5%, giving a daily rate of £1.17, from 16 January 2007 to 7 January 2008, less 99 days, making a total of £301.

24. LEGAL COSTS

EVIDENCE AND SUBMISSIONS

The Respondents sought to recover the costs incurred by them in instructing solicitors to deal with a County Court claim against Ms Paulsen and the previous LVT proceedings brought by Ms Paulsen. Following the service charge demand in November 2006, payment was not made. The Respondents therefore issued a claim in Brighton County Court on 16 April 2007. Before doing so they were notified by Ms Paulsen that she had referred the matter to the LVT, but no LVT application had been issued by that time. The Respondents obtained judgment in default of defence on 10 May 2007. They then received payment from the mortgage lenders, and attempted to discontinue the claim, but discontinuance was refused by the Court. Ms Paulsen applied successfully to set that judgment aside. Mr Duddy said that Ms Paulsen's application was misleading, because she told the court she had made the LVT application earlier, and because she relied on not having received the claim documents, which the Respondents doubted. The application to set aside was opposed, but was granted on 28 June 2007, and an order was made for costs in the case.

25. The Respondents had incurred a costs bill of £1539 plus VAT up to the end of June 2007. This included representation at the contested application to set aside judgment, the issue fee for the county court claim, numerous letters and telephone calls. The Respondents produced itemised schedules of costs from their solicitors.
26. After judgment was set aside, the parties concentrated on the previous LVT proceedings. These challenged many service charge items. Mr Duddy said that the Respondents were successful on every point. The Tribunal however noted that the previous LVT had determined against the Respondents that Ms Paulsen could not be asked to pay for work to the balcony via the service charge, because it was part of her own demise.
27. The Respondents had incurred a costs bill of £430.50 plus VAT from the end of June 2007 to the conclusion of the previous Tribunal proceedings.
28. The Applicant said that the provisions of the Eighth Schedule as set out above referred to the Landlord's obligations under the Lease, and she did not accept that the Lease allowed the Respondent to claim these costs as service charges. She said that the amounts claimed for costs were too high. Far from misleading the court about the date of her LVT application, she had attached a copy of the LVT's acknowledgement letter to her application to set aside judgment. This was clear from the documents before the Tribunal. It was common ground at hearing

that Ms Paulsen's share of service charges was one-half of the sums due under the Lease.

29. REASONS FOR THE DECISION

The Tribunal considered the Lease and concluded that the County Court claim and the earlier LVT proceedings both concerned service charges for works of maintenance or repair which the landlord was liable to do under the Lease; the costs of pursuing those charges or resisting the LVT application therefore arose in pursuance of the landlord's obligations under the Sixth Schedule because the work could not be done otherwise. Accordingly Dean Wilson Laing had been employed for the purpose of carrying out the Landlord's obligations and the costs came within the terms of the Lease.

30. The Tribunal considered that the Respondents were entitled to issue the County Court claim and on the evidence the Applicant's LVT claim had not been made by that time. However, the LVT claim was issued by the time that the Respondents sought judgment in default of defence. It clearly canvassed the same issues. The judgment was obviously vulnerable to being set aside in the light of that LVT claim. The allegation by the Respondents (and by their solicitors) that Ms Paulsen had misled the court as to the date of her LVT application simply did not stand up to scrutiny, as she had annexed the LVT letter date stamped 2 May to her court application. The court had evidently been satisfied that Ms Paulsen had made out her basis for setting judgment aside, and had ordered costs to be in the case, and had evidently thought it was inappropriate for the Respondents to try to discontinue when the application to set aside was still live. In any event, if the discontinuance had been successful, Ms Paulsen would have been entitled to her costs of the action under CPR Part 38. In the circumstances the Tribunal considered that the Respondents' legal costs post-issue until the end of June 2007 were not reasonably incurred.

31. In relation to the costs incurred from July 2007 to 20 November 2007 (£430.50) the Tribunal noted that the previous LVT had refused to make a s20C order. However the Tribunal thought that some of the costs in this period, and in the period before the County Court claim (February 2007 to 16 April 2007) were not reasonably incurred. The Respondents had experienced local managing agents acting for them at the time, who could have dealt with some of the preparation and correspondence relating to the Tribunal claim. Certain of the letters charged for at the solicitors' usual rate were extremely brief, even mere covering notes. There was no reason for 5 letters following the previous LVT to have been required, not least because the letters continued to fail to reflect the determination by the previous LVT in that they still demanded the money for the balcony.

32. The Tribunal therefore adjusted the sums demanded and determined that the total sum of costs to which Ms Paulsen should be required to contribute was £409.50 plus VAT between February - April 2007 and £328.50 plus VAT for July - November 2007 plus the court issue fee of £250 making a total of £1117.15 of which her contribution will be one-half. No service charge demand complying with s21B Landlord & Tenant Act 1985 had been given to Ms Paulsen by the time of hearing and so none of that money was yet payable.

33. OTHER COSTS APPLICATIONS

Mr Duddy said that the Respondents did not intend to add their legal costs of the proceedings to the service charge. Nonetheless the point was before the Tribunal, which made its decisions under s20C and the Fees Regulations for the following reasons. Notwithstanding the previous LVT finding Ms Paulsen continued to receive documents and letters (including a s146 Notice) claiming a sum which included the money for the balcony right up to January 2008. The s146 Notice also included a claim for the costs in full, without taking into account the fact that her service charge contribution is one-half, or that no valid service charge demand had been issued for those costs. No proper service charge demand was issued in 2007, but the Applicant tendered voluntary payment. Her cheques were refused. She had no alternative but to make this Application to avoid the risk of forfeiture, or the risk of her mortgage company paying the money again despite it not being owed. The Respondents had entirely misconceived the nature of their claim for legal costs, and it was not until the Tribunal raised the issue of jurisdiction (at pre-trial review and at the final hearing) that Mr Duddy reframed his case to bring it within the Tribunal's jurisdiction on service charges.

34. The Tribunal decided in these circumstances that the Respondents' costs of these proceedings were not to be regarded as relevant costs for the purposes of the service charge, and that the Respondents should reimburse to the Applicant the sum of £100 towards the fees totalling £250 for application and hearing which Tribunal records showed she had paid.

Signed-----*huc*----- Chair

Dated-----*7 May 2018*-----