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HM Courts & Tribunals Service

Residential Property TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER [SECTIONS 27A & 20C OF THE LANDLORD AND TENANT ACT 1985] [& SCHEDULE 11 TO THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002]

Case Reference
LON/00AU/LSC/2012/0384

Premises:
30A MARLBOROUGH ROAD LONDON N19 4NB

Applicant:	**PAUL FAIRCLOUGH & ANNA MARIA ARMIERI**
Representative:	
Respondent(s):	**HAVALI LTD**
Representative:	**Mr A Arora, in house solicitor**
Date of hearing:	**23rd August 2012**
Appearance for Applicant:	**Both Applicants appeared in person**
Appearance for Respondent(s):	**Mr A Arora**
Leasehold Valuation Tribunal:	**Mrs T Rabin** **Mrs J Davies**
Date of decision:	**2nd September 2012**

Decision of the Tribunal

(1) The Tribunal determines that the costs of the proceedings under Section 20ZA fall within the Section 20C order made by decision 0135 and are not relevant costs to be taken into account in determining the service charges. There is no liability on behalf of the Applicants to pay £150 hearing fee

(2) The Tribunal determines that the costs that are the subject of these proceedings are not recoverable as service charges or as costs in connection with the landlord's repairing obligations.

(3) The amount allowed for the administration charge in issuing details of the service charges is £10 payable by the Applicants

(4) Interest is only chargeable on the amount due from the Applicants in accordance with this decision and an allowance should be made for any overpayment.

(5) The Tribunal accordingly makes and order under Section 20C of the 1985 Act

The application

1. The Applicants seek determinations pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to their liability to pay various costs, at least some of which were the subject of the Tribunal's determination in relation to the same property under number LON/00AU/LSC/2011/0135 ("0135"). The application relates to 30A Marlborough Road London N19 4NB ("the Flat"). The Applicants are the long leaseholders and the Respondents are the freeholders of the building of which the Flat forms part("the Building"). A copy of the lease under which the Applicants hold the Flat ("the Lease") is in the bundle.

2. The Applicants maintain that the costs the subject of this application followed the decision in 0135 when the Tribunal made an order under Section 20C of the 1985 Act to the effect that the costs of those proceedings were not to be regarded as relevant costs to be taken into account when determining the amount of service charge payable. The Respondents maintain that costs, which relate to the earlier application under Section 20ZA of the 2002 Act are due and payable by the Applicants but not the other tow long leaseholders.

3. The costs in dispute are:

LVT hearing fee	£ 150.00
Managing agents fee in preparing statement 50%	£ 300.00

Legal costs of drafting attending hearing	£1,500.00
Counsel's fee	£ 600.00
Surveyor's costs of attending 2 hearings	£ 600.00
Expert Report	£ 540.00
TOTAL	**£3,690.00**

4. These costs arose as a result of the proceedings under Section 20ZA of the 2002 Act and the Respondent considers these are the liability of the Applicants as the remaining long leaseholders accepted the costs.

5. The Applicants requested a breakdown of the service charge costs in December 2011 and this was provided by way of an e-mail for which the Respondents were making a charge of £75 being 33.33% of the cost of supplying these and the Applicants seek a determination as to the reasonableness of this administration cost.

The hearing

6. Both the Applicants attended and they both made submissions to the Tribunal. The Respondent was represented by Mr Ajay Arora, the in house solicitor for the Respondent who made submissions on behalf of the Respondents, There was a large bundle of documents produced by the Applicants which the Tribunal considered when making its decision. Mr Arora produced a copy of the case of **Freeholders of 69 Marina, St Leonards on Sea and others v Oram and Ghooran B5/2011/CCRTF.**

The background

7. There were proceedings brought by the Respondents against the Applicants and the owners of Flats B and C Marlborough Road aforesaid in 2011 and the Tribunal issued decision 0135 on 29th July 2011. The proceedings related to an application under Section 20ZA of the 1985 for a dispensation from the consultation requirements of Section 20 of the 1985 Act in relation to emergency roof works undertaken by the Respondents and for a determination under Section 27A of the 1985 Act in relation to the reasonableness of the proposed major works.

8. The Tribunal when making decision number 0135 determined that there should be a dispensation under Section 20ZA of the 1985 Act as the works relating to the roof repairs were urgent. The Tribunal found that the costs the subject of the application under Section 27A were not be reasonably incurred. The Tribunal made an order under Section 20C of the Act and also ordered the Applicants to reimburse the fees to the Respondents in respect of the

application under Section 20ZA as they were the only long leaseholders who had not agreed to the proposed costs in advance. The issue before the Tribunal is whether the costs of £3,690 relating to the bringing of the Section 20ZA proceedings would be recoverable from the Applicants. They have already refunded the application fee of £150.

Submissions

9. Both the Applicants made submissions. On 26th August 2011 the Applicants made payment of the sum of £3,150 less monies owning to the Applicants for an insurance refund, making a total of £1,276 but the cheque was payable to the Respondents and not the managing agents, Arora Properties ("the managing agents"). It was accordingly returned to the Applicants on 2nd September 2011 together with an invoice including the roof works and costs of £3,650, which the Applicants considered the Tribunal had determined, were not payable.

10. There was correspondence between the Applicants and managing agents with the Applicants stating that the sums were not owing and the managing agents Properties maintaining that the costs were payable. The Applicants were unwilling to send another cheque for the roof works as they feared that the managing agents would apply the sum to the disputed costs and not the roof works as they had experienced this in the past when the managing agents had applied a payment of sums not disputed to disputed sums and repeated the demand for sums the Applicants had intended to pay.

11. The managing agents did not address the Applicants issues regarding the non payability of the costs but threatened legal proceedings on 3rd October 2011 unless the disputed sum was paid within 14 days. There was a disagreement between the parties regarding the interpretation of Section 20C order in decision 0135. The view of the Respondents was that the costs in relation to the proceedings under Section 20ZA were determined as payable by the Tribunal. The Applicants sought clarification but the Chair who had written the determination had retired and clarification could not be sought. Mr Arora wrote to the Applicants on 21st May 2012 setting out the details of the costs in relation to the proceedings under Section 20ZA.

12. The Applicants paid the roof works together with interest of £70.32 and the LVT hearing fee on 25th March 2012. They now state that the interest paid was excessive as it should have been limited to the costs of the roof and that there was no liability for interest on the costs as they were not payable. They are seeking a determination that only interest on the late payment of the roof works is due,

13. The Applicants submit:

(a) The costs claimed are covered by the Section 20C order in decision 0135 and are not payable

(b) That the costs are not in contemplation of a notice under Section 146 of Law of Property Act 1925

(c) That the lease under which the Flat is held makes no provision for the recovery of costs of proceedings

(d) That the costs, if payable are unreasonable

(e) The "fees" referred to in the decision 0135 can only relate to the fees payable under the Leasehold Valuation (Fees) (England) Regulations 2003

(f) That the outstanding interest due from the Applicants is £47.47 and not £70.32 as paid in error by the Applicants and no interest is due for late payment of the disputed costs.

14. Mr Arora made submissions on the part of the Respondents. He pointed out that he had no connection with the managing agents but had been the secretary of the managing agents in 2010. He admitted that he shared offices with the managing agents but his role was separate as he acted as the in-house solicitor for the Respondents and had no role in the management of the Flat.

15. Mr Arora submitted that the determination in relation to Section 20C in the decision 0135 did not relate to the proceedings under Section 20ZA but simply to the proceedings under Section 27A. The Tribunal in 0135 had determined that the costs of the emergency roof works were reasonable and that there had been no significant prejudice to the Applicants. He pointed out that the Tribunal awarded costs (specifically the LVT fee) against the Applicants and the whole of the costs claimed were recoverable from the Applicants and not the other long leaseholders as the Applicants were the only ones who objected which led to the need for the Section 20ZA proceedings to be taken. He submitted that the Applicants were responsible for the hearing fee since, although no separate hearing fee was paid in relation to the Section 20ZA proceedings, a hearing fee was due and the sum of £150 was the minimum fee and this was due from the Applicants pursuant to the decision of the Tribunal in decision 0135.

16. Mr Arora submitted that the sums claimed would be part and parcel of the Respondents' repairing obligations under the lease and recoverable as service charge. If the costs are not the responsibility of the Applicants, the Respondents will seek to recover them from all the long leaseholders as a service charge and the Tribunal is invited to make a determination as to the liability of the Applicants to pay in accordance with the terms of their lease. He again referred the Tribunal to authorities in support of his submissions.

17. Mr Arora submitted that the sums claimed were recoverable as a necessary function in order to issue a notice under Section 146 of the Law of Property Act 1925 ("Section 146 Notice") in order to make the Applicants contribute to the emergency roof works and the provisions in the lease are wide enough to allow for costs payable in contemplation of issuing a Section 146 notice.

18. A landlord must take proceedings in the Tribunal as a necessary preliminary to instituting procedures for forfeiture of a lease on grounds other than arrears of rent pursuant to Section 168 (1) and (2) of the 2002 Act. The landlord therefore has a right to pursue forfeiture and it follows that the landlord can recover costs necessarily incurred in contemplation of a Section 146 Notice.

19. Mr Arora referred the Tribunal to a number of authorities to support his submission that the courts will order reimbursement of costs of litigation. He relied heavily on **Marina Drive** and submitted that the facts in that case were very similar to the facts in the instant case as it related to recovery of emergency works and the recovery of these through County Court proceedings and the Court of Appeal determined that the costs incurred in the preparation of notices and schedules to enable a Section 146 Notice to be served were recoverable as incidental to the preparation of a Section 146 Notice.

The Tribunal's decision whether the costs claimed are within the Section 20C Order in decision 0135.

20. The Tribunal carefully considered the evidence of both parties and the submissions made. The Tribunal also had regard to the determination in decision 0135. The decision set out under headed sections its findings in each of the applications before it. Dealing with application under Section 20ZA in paragraphs 34-39, the Tribunal acknowledged that the roof works were an emergency. The Tribunal considered that an earlier application under Section 20ZA would have been appropriate but acknowledged that efforts were made to give the leaseholders the opportunity to comment but, of course, by this time, the decision had effectively been made. A determination of reasonableness was made in the absence of any evidence to the contrary from the Applicants , who were one of the Respondents in 0135.

21. The Tribunal then went on to consider the application under Section 27A and their decision was under the heading "The Tribunal's decision" in paragraphs 52-58. The decision under Section 20C was under the heading "Application under Section 20C " and in paragraphs 59-64 of 0135. This read as follows:

> 59. The respondents asked that the applicants' costs of the proceedings should not be regarded as relevant costs in determining the amount of any service charge payable by them
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> 60. Mr Arora described the leaseholders' resistance to the completed and proposed work as "unreasonable and misconceived"

61.He reminded the Tribunal that Section 20C 'should be used only to avoid the unjust payment of otherwise recoverable costs" and "those entrusted with the discretion... should be cautious to ensure that it is not itself turned into an instrument of oppression "

62. Mr Arora was not able to point to any specific provision in the leases which enabled the applicants to recover their costs but the Tribunal, in any event, considered that it was just and equitable in the circumstances to grant the respondents' application

63. Whilst the Tribunal accepted that the applicants had little alternative but to make their Section 27A application, the Tribunal had found in favour of the respondents in their two pronged challenge.

64. However in view of the fact that the Tribunal had granted the dispensation under the Section 20ZA, they considered it was appropriate under Clause 9 of the Leasehold Valuation Tribunal (Procedure) (England) Regulations 2003 to require the leaseholders of Flat A to reimburse the applicants with their fees in respect of the application"

22. The Tribunal noted that there was no mention of excluding the Section 20A application from the Section 20C order. Had that been their intention, the Tribunal would clarified this in the decision 0135. It is clear from the wording of paragraphs 59-64 that the Tribunal was referring to both of the applications since, had they intended to treat them differently, they would have made their determination about the refund of the application fee for the Section 20ZA application within that section and made it clear that the 20C order did not apply to that application. Since the question of costs and fees were all dealt with under one heading, a commonsense view must be that the Section 20C order applied to both the applications before the Tribunal. The Directions given on 29th March 2011 clearly state in Paragraph 9 that applications for refund of fees and Section 20C order should be made in writing. The decision merely follows the direction given and deals with the Section 20C application and the fees.

23. The Tribunal did not agree with Mr Arora that, although only one fee had been paid, since there would have been a hearing fee for the Section 20ZA proceedings, the minimum fee of £150 should be paid in addition to the application fee of £150. No separate charge was made to the Respondents and there is no reason why the single fee they incurred should be repaid by the Applicants

Decision

24. The Tribunal determines that the costs of the proceedings under Section 20ZA fall within the Section 20C order made by decision 0135 and are not relevant costs to be taken into account in determining the service charges. There is no liability to pay £150 hearing fee

The Tribunal's decision on whether the costs form part of proceedings in contemplation of the service of a Section 146 Notice

25. The Tribunal has had regard to the relevant provisions in the lease. Section 146 costs are referred to in Clause 5(b) of Part 1 of the Fifth Schedule to the lease as follows:

> "To pay to the Lessor all costs charges and expenses (including legal costs and fees payable to a surveyor) which may be incurred by the Lessor incidental to or in contemplation of the preparation and service of a notice under Section 146 or 147 of the Law of Property Act 1925 of ant re-enactment or modification thereof notwithstanding that forfeiture may be avoided otherwise that by relief granted by the court"

26. The Tribunal notes that the demands and the correspondence regarding the costs all refer to the costs in connection with the proceedings for dispensation under Section 20ZA. This was clearly how the Respondents regarded these costs and there was no mention of any forfeiture proceedings or the service of any Section 146 notice between July 2011 and April 2012 as the first mention of forfeiture proceedings was in a letter for the managing agents dated 24th April 2012 when a demand for outstanding costs of £4,230.01 was made with a threat that if not paid with 14 days, the matter would be passed to the Respondent's solicitors for forfeiture proceedings to be commenced. The managing agents had made threats that they would take legal proceedings in October 2011 but these were not followed up and there was no real suggestion that there would be forfeiture proceedings until April 2012. Mr Arora cannot therefore argue that the costs were incurred in contemplation of forfeiture proceedings when he allowed the roof work costs to remain outstanding from July 2011 to March 2012 without taking any action other than asking the managing agents to write making threats of legal proceedings.

27. The Tribunal is firmly of the view that the argument that proceedings for dispensation under Section 20ZA can be regarded as costs incurred in contemplation of service of a Section 146 Notice has no merit. The decision 0135 sets out the timetable and it is clear that the leaking roof became a problem from June 2010 and, although unsuccessful attempts had been made to find the contractor who had given a guarantee earlier, it was not until September 2010 that the Respondents arranged for an inspection and quotation obtained for the repair of the roof. It was in October 2010 that the roof had become an emergency.

28. The need for a Section 20ZA application was because the Respondents had failed to undertake the correct procedure and to make a Section 20ZA application at the appropriate time, namely in June or July 2010, when it became apparent that the original contractors had failed to honour their guarantee. It cannot be argued that these proceedings were in contemplation of a Section 146 Notice as the Respondents were well aware that, if they did not have the dispensation from the Tribunal, the amount they could recover

would be limited to £250 as they had failed to undertake the required consultation under Section 20C of the 1985 Act.

29. The authorities produced by Mr Arora were not relevant to these proceedings. The case of **Marina Drive** related to costs incurred directly in connection with the issue of a notice under Section 146 whereas in the instant case the proceedings were instituted to ensure that the Respondents' recovery would not be limited to £250. The Tribunal rejects Mr Arora's submissions to the effect that the costs claimed are recoverable as being in contemplation of Section 146 proceedings. In any event, the service charges are reserved as rent under Clause 2 (b) of the lease and Section 146(11) provides that a notice is not necessary to exercise a right of re-entry where the service charges are reserved as rent. It follows that any proceedings in contemplation of the service of a Section 146 notice are not necessary and that the costs would therefore not be recoverable as it would be burdensome to require a lessee to pay for otiose proceedings when there is no necessity for these to be brought.

Decision

30. The costs the subject of these proceedings are not costs incurred in the contemplation of the service of a Section 146 notice

The Tribunal's decision as to whether the costs are recoverable as part of the costs of repair under the lease

31. The Tribunal has considered the terms of the lease and finds that there is no provision which allows the landlord to recover any costs beyond those specified in Part 1 of the Sixth Schedule to the lease. Whilst paragraph (3) of the Sixth Schedule allows the landlord to recover the costs of managing the property, this cannot be construed as costs of proceedings under Section 20ZA of the 1985 Act as these proceedings are not connected with the management of the property but were to seek full recovery of costs by a landlord when the consultation requirements of Section 20 of the 1985 Act have not been complied with. It cannot have been the intention of Parliament that the legislation leading to the implementation of Section 20ZA could be used to reimburse a landlord for costs flowing from a lack of consultation, for whatever reason undertaken to ensure that full recovery could be made.

32. Mr Arora asked the Tribunal to make a determination that the costs the subject of these proceedings can be recovered as part of the landlord's costs of repairs covenanted to be undertaken pursuant to the terms of the lease. Mr Arora referred the Tribunal to the Clause 3, Fifth Schedule of the lease, Part 1 paragraph (2). This refers to the obligation to pay the Lessee's contribution that is defined as 30%. This in turn refers to the definition of the "service charge" and this is defined as the money spent by the landlord in providing the services set out in Part 1 of the Sixth Schedule. The repairing obligations in Clause 2 of Part 1 of the Sixth Schedule are clear and there is no right for the landlord to pass on any incidental costs in relation to undertaking the repairs

beyond those specified in the Lease. In any event, for the reasons stated above the Tribunal finds that the costs in connection with an application under Section 20ZA would not be covered in any event.

33. The Tribunal finds that the costs are not recoverable because these were the subject of a order under Section 20C of the 1985 Act. Even if this were not the case, the lease makes no provision for the recovery of such costs.

Decision

34. The Tribunal determines that the costs the subject of these proceedings are not recoverable as service charges or as costs in connection with the landlord's repairing obligations.

Decision as to the reasonableness of the charge for providing a breakdown of the service charges

35. The managing agents have made a charge of £75 being 30% of the cost of extracting the information regarding the service charges for 2008/9, 2009/10 and additional costs attributable to Flat A in 2010. The Tribunal was referred to an e-mail dated 22nd December 2011 addressed to all three long leaseholders in which simply appears to be a reproduction of invoices that had almost certainly been submitted previously. This is information that would be familiar to the managing agents and there was no breakdown of what sums had been paid. In the view of the Tribunal a reasonable cost would be £30 in total, making the Applicants' share £10 and this is the amount allowed as an administration charge, subject to this being chargeable in accordance with the terms of the lease.

Decision

36. The amount allowed for the administration charge in issuing details of the service charges is £10 payable by the Applicants

Interest

37. Interest is only chargeable on the amount due from the Applicants in accordance with this decision and an allowance should be made for any overpayment.

Section 20C

38. In the application form and at the hearing, the Applicants applied for an order under section 20C of the 1985 Act. The Tribunal does not consider that there is provision in the lease for charging the costs of these proceedings within the service charges For the avoidance of doubt, the Tribunal nonetheless determines that it is just and equitable in the circumstances for an order to be

made under section 20C of the 1985 Act, so that the Respondents may not pass any of its costs incurred in connection with the proceedings before the Tribunal through the service charge.

Tamara Rabin
Chairman