9459

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**: CHI/29UL/LIS/2012/0102**
Property	**: Flat 3 33 Augusta Gardens Folkestone Kent CT20 2RT**
Applicant	**: Mr. T.W. Smith and Mrs. C.A. Smith**
Representative	**: Unrepresented**
Respondent	**: 33 Augusta Gardens RTM Co. Ltd**
Representative	**: Dr. G. Ergun**
Type of Application	**: Service Charges Section 27A of the Landlord and Tenant Act 1985**
Tribunal Members	**: Judge R. Norman (Chairman) Mr. R. Athow FRICS MIRPM Mr. P.A. Gammon MBE BA**
Dates and venue of Hearing	**: 8th March 2013 13th June 2013 Folkestone, Kent**
Date of consideration of further submissions	**: 1st August 2013**
Date of Decision	**: 4th September 2013**

DECISION

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Decision

1. The following decisions are made by the Tribunal:

(a) At the present time, the only sum representing service charges which Mr. T.W. Smith and Mrs. C.A. Smith ("the Applicants") are liable to pay to 33 Augusta Gardens RTM Co. Ltd ("the Respondent") in respect of Flat 3, 33 Augusta Gardens, Folkestone, Kent CT20 2RT ("the subject property") is £450 being service charges claimed in 2008. Payment to be made by the Applicants to the Respondent within 28 days of this decision being sent to the parties.

(b) An order is made under Section 20C of the Landlord and Tenant Act 1985 ("the Act") that all or any of the costs incurred or to be incurred by the Respondent in connection with these 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 Applicants.

Background

2. The Applicants are the lessees of the subject property. From 24th November 2008 the Respondent RTM Company took over management of 33 Augusta Gardens Folkestone ("the Building") of which the subject property forms part. In November 2012 Dr. G. Ergun acquired the freehold of the Building. She also holds a lease of Flat 2 at the Building.

3. The Applicants made an application to the Tribunal for a determination of liability to pay and reasonableness of service charges in respect of the years 2008-2013.

4. There is also an application (CHI/29UL/LBC/2012/0030) by Dr. Ergun against the Applicants in these proceedings for a determination that a breach of covenant has occurred. However, in respect of that application no progress could be made at the present time because we were informed by Dr. Ergun that there are proceedings pending in the High Court and the County Court in relation to a claim for forfeiture.

Inspection

5. On 8th March 2013 in the presence of Mr. Smith, Mrs. Mossop (Solicitor representing the Applicants at that time) and Dr. Ergun, the Tribunal inspected the exterior and parts of the interior of the Building.

6. Areas where work had been done were pointed out. In particular, from ground level at the front of the Building, areas of repair to bonnet tiles were pointed out to us. From ground level at the rear of the Building we were shown where work had been undertaken at a high level and we were told about a balcony which had been removed. The common internal areas were acceptable but we noted on the staircase wall an area of water staining. We inspected the interior of the subject property where it was alleged a leak had occurred but remedial work had been done and consequently nothing of evidential value could be seen.

Hearing 8th March 2013

7. At this hearing the Applicants were represented by Mrs. Mossop. We heard evidence from Dr. Ergun and the Applicants and submissions by Dr. Ergun and Mrs. Mossop. A great deal of the evidence and submissions concerned matters which were not within the scope of this application. We were also informed by Dr. Ergun that there were matters concerning the parties and the subject property which either had been or were still before the High Court and the County Court. Clearly the Tribunal could not become involved in matters which had been decided by a court. Neither could the Tribunal make decisions on matters in respect of which a decision from a court was awaited.

8. The service charges challenged by the Applicants fell into three groups:
(a) £450 in respect of service charges claimed in the year 2008.
(b) £1,500 in respect of service charges also claimed in the year 2008.
(c) Service charges in respect of subsequent years.

9. The sum of £450 claimed in respect of service charges in the year 2008 was said to be owed in respect of a period preceding 2008 and became a deficit which was carried forward.

10. After we had heard much evidence and submissions about this sum, the Applicants accepted that they were liable to pay it.

11. The sum of £1,500 was also claimed in respect of service charges in the year 2008. It was an estimated charge for the year ending 24th December 2009. In respect of that sum, the case advanced by Dr. Ergun was that at the time of that sum becoming due Mr. Smith was taking part in the management of the Building and that included sending out demands for payment of service charges. That amounted to an agreement to the service charges demanded and as a result he could not bring proceedings under Section 27A of the Act in respect of that sum.

12. The Applicants' case was that Dr. Ergun, on behalf of the Respondent, had agreed that the cost of work done by Mr. Smith should be credited to the Applicants with the result that the Applicants were not liable to pay the sum of £1,500. Produced in evidence at B30 of the Applicants' bundle was an email dated 22nd January 2009 from Dr. Ergun to Mr. Smith in which she stated that: "I will count the £1,500 towards the repairs done to date...".

Hearing 13th June 2013

13. At this hearing the Applicants were not represented.

14. The Tribunal was concerned with the service charges claimed for years subsequent to 2008.

15. Again, evidence was provided and submissions were made which were irrelevant to the proceedings being considered by the Tribunal.

16. Dr. Ergun stated that she was still waiting for a decision on her application for consent to appeal to the High Court. Apparently this was in respect of the forfeiture proceedings.

17. The parties had also been engaged in other proceedings including a dispute apparently arising out of what amounted to the setting up of a second Right to Manage Company to manage the Building.

18. Evidence was given and submissions were made about the period during which Mr. Smith was a director of the Respondent. He stated that he was registered as a director from December 2008 to June or July 2009 when he resigned. At a meeting in October 2009 an unsuccessful attempt was made to vote out Dr. Ergun as a director. Mr. Smith stated that he stopped holding himself out as a director after the court case in May 2011 and that a forfeiture notice was served on the Applicants the next day. Dr. Ergun stated that Mr. Smith was appointed a director on 4th October 2008 and ceased to be a director in June 2011.

19. There was a period when in respect of the Respondent there were two sets of accounts and two sets of directors. Mr. Smith accepted that all he had ever paid into the service charges account was £500 and that had not been paid into the account being run by Dr. Ergun but into the other RTM account. After the court case in May 2011, Dr. Ergun withdrew the money from the second RTM account and paid it into the RTM account run by her.

20. We heard evidence about meetings of the Respondent and who had been invited to attend. Also evidence of invitations to attend which did not carry with them the ability to vote.

21. Minutes of meetings of the Respondent were sent out and Dr. Ergun considered that the provision of those minutes amounted to a demand for service charges. Asked as to the whereabouts of the demand sent in 2009 for the year 2009 – 2010, Dr. Ergun stated it was not in the papers. She just had the minutes of a meeting held on 6th November 2009 at pages D9 and D10 of the Respondent's bundle of documents and stated that the summary of tenants' rights was attached but a copy was not in the papers. The Applicants stated that they had never received a summary of tenants' rights. As to the following years, Dr. Ergun stated that no demands for service charges had been made after 2009 because she was trying to forfeit the Applicants' lease.

22. Mr. Smith gave evidence of the work he had carried out or had paid others to carry out at the Building and that evidence was supported by invoices. The carrying out of the work and the accuracy of those invoices was challenged by Dr. Ergun.

23. There was a time, in 2008 when Mr. Smith and Dr. Ergun were working together to manage the building. Mr. Smith was taking care of the practical work and Dr. Ergun was dealing with the paperwork. That relationship soured. Mr. Smith and Dr. Ergun each have their explanations for why that happened. While there is clear evidence in the email referred to

above in support of the arrangement that the £1,500 would be counted towards the repairs done to the date of the email, there is no similar evidence of any subsequent arrangement. Dr. Ergun's evidence is that, notwithstanding the contents of that email, she never agreed to any such arrangement. Mr. Smith's evidence is that there was such an arrangement and that Dr. Ergun reneged on it.

24. The Applicants alleged that there had not been compliance with the consultation requirements of Section 20 of the Act in relation to major works and no evidence of compliance was produced. Dr. Ergun appeared to be of the view that the meetings of the Respondent were sufficient consultation.

25. Dr. Ergun drew attention to the Applicants' offer to settle the service charges on completion of the sale of the subject property. The sale did not proceed and settlement was not made. Mr. Smith drew attention to an email dated 20th September 2011 (page C2 of the Applicants' bundle) from him to two directors of the Respondent in which he stated "There is another option which is for us to sell the flat, (there is a sale progressing although in early stages) I may make a commercial decision to settle the service charges on completion even though I fundamentally deny that these sums are owed."

26. At the end of the hearing on 13th June 2013, the application for an order under Section 20C of the Act was explained. The Applicants and Dr. Ergun were asked to submit written representations about the making of such an order and they agreed that the application be dealt with in that way. Representations were received from the Applicants and from Dr. Ergun.

27. On 1st August 2013 the Tribunal reconvened and considered all the documents which had been received, all that had been heard at the hearings and all that had been seen at the inspection and reached conclusions on a balance of probabilities.

Reasons

28. Liability to pay the service charges of £450 claimed in 2008 was accepted by the Applicants.

29. As to the sum of £1,500 claimed in 2008, the Applicants and Dr. Ergun provided a great deal of contradictory evidence and made references to what was alleged to have been said or not said in the court proceedings and elsewhere and submissions were made. After considering all the relevant material we accepted the evidence that Mr. Smith by his involvement in the management of the Respondent had agreed to the sum claimed and the Applicants could not now challenge it. However we accepted the evidence of Mr. Smith, supported by the contents of the email dated 22nd January 2009 from Dr. Ergun to Mr. Smith in which she stated that: "I will count the £1,500 towards the repairs done to date...". Consequently, although the sum cannot be challenged, it is not payable because work to the value of £1,500 carried out to the date of the email had been accepted by Dr. Ergun, on behalf of the Respondent, in settlement.

30. The service charges in respect of years subsequent to 2008 are disputed.

31. It was submitted that there had been a lack of consultation in respect of major works as required by Section 20 of the Act. The minutes of meetings did not satisfy the consultation requirements. No evidence was produced of compliance with the consultation procedure and in the absence of such compliance, or a dispensation, legislation states that only £250 can be claimed from the lessees in respect of works requiring consultation.

32. Allegations were made by Dr. Ergun about the work carried out by Mr. Smith or on his behalf and for which he paid. It was alleged that the work had not been done or that it had been done to less than a reasonable standard. Allegations were made which included:
(a) That the work could not have been done because similar work had to be done again some time later.
(b) That the dates on invoices were too soon after the work had been requested.
(c) That invoices were for work carried out at other premises belonging to Mr. Smith.

33. We considered all the allegations which were made and were satisfied by the evidence from Mr. Smith and what we saw at the inspection that the work had been done. For example:
(a) Mr. Smith explained that he had carried out some repairs to the spindles on the stairs but it had been restricted to only work which was essential at that time and further work was needed later.
(b) The work was already in progress before it had been officially requested and therefore it had been possible to produce an invoice within a short time.
(c) The Applicants produced photographic evidence in support of some of the work carried out. Dr. Ergun alleged that some of the photographs were not of the Building but of other property. However, on careful examination of the photographs we were satisfied that they were of the subject Building.
(d) Invoices were produced.

34. We were satisfied that there was insufficient evidence to support Dr. Ergun's allegations.

35. The Applicants offered to settle the service charges claimed on the sale of the subject property. The sale was not completed and Dr. Ergun sought to rely on that offer as evidence of agreement to the sums claimed. We considered that possibility and considered the email dated 20th September 2011 in which Mr. Smith stated that "There is another option which is for us to sell the flat, (there is a sale progressing although in early stages) I may make a commercial decision to settle the service charges on completion even though I fundamentally deny that these sums are owed." We came to the conclusion that the contents of that email were clear evidence that the suggestion of settling the service charges on completion of the sale of the subject property was a suggested way of bringing the dispute to a conclusion without an admission of liability.

36. In order to be enforceable, demands for service charges have to comply with the Service Charges (Summary of Rights and Obligations, and Transitional Provision)(England) Regulations 2007. The Applicants submitted that the service charges were not payable because any documents which could be considered to be demands were not accompanied by a summary of tenants' rights and therefore there was a failure to comply with the Regulations. Dr. Ergun was aware that compliance with the Regulations was being challenged but did not produce copies of compliant demands. By not doing so, the evidence of the Applicants that they had never received a summary of tenant's rights was supported. We came to the conclusion that the minutes of meetings and any other documents produced in evidence which could be considered to be demands for service charges did not comply with those Regulations. Consequently demands for those sums are unenforceable.

37. Dr. Ergun's evidence was that no demands for service charges had been made after 2009 because she was trying to forfeit the Applicants' lease.

38. In the absence of a demand, service charges are not payable.

39. There is before us an application for an order under Section 20C of the Act. We find that it is just and equitable in the circumstances to make such an order because the Applicants were justified in bringing these proceedings to clarify the position and have been successful in challenging almost all the service charges claimed. We therefore make an order that all or any of the costs incurred or to be incurred by the Respondent in connection with these 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 Applicants.

Appeals

40. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

41. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

42. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

43. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Judge R. Norman (Chairman)

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**: CHI/29UL/LIS/2012/0102**
Property	**: Flat 3 33 Augusta Gardens Folkestone Kent CT20 2RT**
Applicant	**: 33 Augusta Gardens RTM Co. Ltd**
Representative	**: Dr. G. Ergun**
Respondents	**: Mr. T.W. Smith and Mrs. C.A. Smith**
Representative	**: Unrepresented**
Type of Application	**: Application for Permission to Appeal a Decision to the Upper Tribunal (Lands Chamber)**
Tribunal Members	**: Judge R. Norman (Chairman) Mr. R. Athow FRICS MIRPM Mr. P.A. Gammon MBE BA**
Date of Decision	**: 23rd October 2013**

DECISION

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Decision

1. The Tribunal is satisfied that there is no justification for an appeal. Permission is therefore refused. The Tribunal did consider, first, whether to review the original decision and decided that it would not. The reasons for that are the same as those for the refusal of permission to appeal.

Background

2. Mr. T.W. Smith and Mrs. C.A. Smith ("the Respondents") are the lessees of Flat 3, 33 Augusta Gardens, Folkestone, Kent CT20 2RT ("the subject property") and made an application to the Tribunal for a determination of liability to pay and reasonableness of service charges in respect of the years 2008-2013. 33 Augusta Gardens RTM Co. Ltd ("the Applicant") was the Respondent in those proceedings. From 24th November 2008 the Applicant had taken over management of 33 Augusta Gardens Folkestone ("the Building") of which the subject property forms part. The Applicant is represented by Dr. Ergun who, in November 2012, acquired the freehold of the Building. She also holds a lease of Flat 2 at the Building. Dr. Ergun represented the Applicant in the original proceedings and now, on behalf of the Applicant seeks permission to appeal the decision of the Tribunal in respect of those proceedings.

Reasons

3. At the hearing of the original application, the parties gave evidence and made submissions in respect of many issues which were outside the jurisdiction of the Tribunal. Clearly the Tribunal could not become involved in matters which had been decided by a court. Neither could the Tribunal make decisions on matters in respect of which a decision from a court was awaited.

4. It became apparent that neither party to the original application had behaved entirely as they should.

(a) Mr. Smith was a director of the Applicant for a time and the parties had been engaged in other proceedings including a dispute apparently arising out of what amounted to the setting up of a second Right to Manage Company to manage the Building. Mr. Smith's actions in relation to the RTM Company were dealt with by the County Court.

(b) Dr. Ergun had tried to forfeit the lease and changed the locks without going through the necessary legal procedure and this was dealt with in the County Court. She is trying to appeal that decision but in the meantime ignores the decision and regards the lease as forfeited.

5. In his judgement in respect of that matter, His Honour Judge Scarratt noted the following:
(a) That he was concerned only with a preliminary issue which should really have taken a relatively short time and that there were no factual disputes that were relevant to that single preliminary issue.

(b) There had been ongoing litigation between the various owners/tenants of flats in the Building for a long time and the parties were no strangers to litigation in that court.
(c) The case should have taken an hour or so but he allowed Dr. Ergun to go through her skeleton argument in some detail for two hours or so and he heard lengthy submissions from Mr. and Mrs. Smith's representative.

6. The evidence presented to the Tribunal revealed that, in addition to disregarding the law as to forfeiture, Dr. Ergun also disregarded the legal requirements as to demanding service charges. Also there was no evidence of compliance with the consultation procedure provided for by Section 20 of the Landlord and Tenant Act 1985 and she did not accept that the Applicant was required to comply.

7. In respect of part of the service charges in dispute, an email dated 22nd January 2009 from Dr. Ergun to Mr. Smith was produced. In that email she stated that: "I will count the £1,500 towards the repairs done to date...". Yet she refused to accept that, notwithstanding the contents of that email, she had ever agreed to any such arrangement.

8. On behalf of the Applicant Dr. Ergun sought to rely on an offer to settle the service charges claimed, on the sale of the subject property. The sale was not completed. An email dated 20th September 2011 from Mr. Smith was clear evidence that the settlement of the service charges on completion of the sale of the subject property was a suggested way of bringing the dispute to a conclusion without an admission of liability.

9. There was clear evidence that Dr. Ergun, on behalf of the Applicant, had failed to comply with landlord and tenant law but there was a complete refusal by her to accept that she could have done anything wrong.

10. The evidence given by Mr. Smith was credible whereas the case for the Applicant as presented by Dr. Ergun was little more than suspicion and allegation without evidence to support it.

11. The Tribunal's decision was based on the evidence produced by the parties.

12. Dr. Ergun's many references to the evidence, submissions and allegations said to have been produced or made in other proceedings before the County Court did not assist the proceedings before the Tribunal.

13. Dr. Ergun in the application makes the sweeping statement that all the invoices produced by Mr. Smith are dishonest but that was not borne out by the evidence before the Tribunal.

14. In accordance with Rule 53(1) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, the Tribunal did consider, first, whether to review the decision and decided that it would not. The reasons for that are the same as those for the refusal of permission to appeal.

15. The Tribunal is satisfied that none of the reasons for this application advanced on behalf of the Applicant apply and that there is no justification for an appeal. Permission is therefore refused.

16. In accordance with section 11 of the Tribunals, Courts and Enforcement Act 2007 and Rule 21 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 the Applicant may make a further application for permission to appeal to the Upper Tribunal (Lands Chamber). Such application must be made in writing and received by the Upper Tribunal (Lands Chamber) no later than 14 days after the date on which the First-tier Tribunal sent notice of this refusal to the party applying for permission.

Judge R. Norman (Chairman)