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

Case Reference : **LON/OOBK/LSC/2013/0627**

Property : **Flat 11 36 Buckingham Gate
London SW1E 6PB**

Applicant : **Bogils Aktiebolag**

Representative : **In Person**

First Respondent : **36 Buckingham Gate Limited**

Representative : **JB Leitch LLP**

Type of Application : **Determination of liability to pay
service charges**

Tribunal Members : **Judge Peter Leighton LLB**

Date of Decision : **14th November 2013**

DECISION

Decisions of the tribunal

- (1) The tribunal determines that the Applicant is required to pay administration charges in respect of the proceedings by virtue of clause 2(6) of his under lease
- (2) The tribunal determines that a reasonable sum for the costs in this case is £3817 plus VAT of £620.16.
- (3) The tribunal makes no order under section 20C in respect of the costs of this application.

The application

1. The Applicant seeks a determination pursuant to Section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") although it appears to the tribunal that the claim arises under Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of service charges /administration charges] payable by the Applicant in respect of the property known as Flat 11 36 Buckingham Gate London SW1E 6PB ("the property")
2. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

3. Directions were given for the matter to be determined by way of a paper determination without an oral hearing. The Applicant and Respondent both prepared a bundle of documents for the tribunal containing their written submissions

The background

4. The property which is the subject of this application is a top floor flat in a purpose built block of flats .the Respondent is the freehold owner of the block and the Applicant holds 3 connected leases for the flat dated 1974,1980 and 1984
5. The respondent is the direct landlord of the Applicant in respect of leases 2 and 3 but in respect of lease 1 a head lease has been granted to Enfranchisement Investments Properties Limited
6. There are a number of covenants regarding the liability to pay service charges in the three leases but it is contended by the Respondent that all rights to collect service charges and to impose any

administration charges in accordance with the terms of the head lease (clause 8) .Leases 2 and 3 were expressed to be granted on the same terms and covenants as reserved in Lease 1.

7. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.
8. The application arises from an action commenced in the High Court in Liverpool for arrears of service charges alleged to be in the sum of £35,140.68. Payment of £30,093 .56 was made by the Applicant for arrears of service charges but the sum of £1,448.12 and £3,548 which were in the nature of administration charges added to the Applicant's account were remitted to the tribunal for determination They appear to have been issued in March and August 2011
9. The Applicant holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge.
10. Clause 2(6) of the lease provides as follows:-

"to pay unto the lessor all costs charges and expenses (including all legal costs and fees payable to a surveyor)which may be incurred by the lessor **in or in contemplation of** any proceedings under Section 146 and 147 of the Law of Property Act 1925 .

The issues

A Liability

11. The essence of the dispute between the parties turns on the ability of the Respondent to impose the administration charges in accordance with clause 6 of the lease and if so whether the charges imposed are reasonable.
12. This area of the law has given rise to some difficulty in the light of the decision in **Freeholders of 69 Marina St Leonards 2011 EWCA Civ 1258** and later cases in the tribunal. There appears to be a formidable debate as to whether the Court of Appeal failed to take into account an earlier decision and an outstanding issue as to whether forfeiture of a long lease on the basis of non payment of service charges requires a Section 146 notice. The authorities were reviewed in a recent decision of the tribunal (**Flat 3, 10 Lennox Gardens Lon 00AW/LAC/20130002**) by Martin Rodger QC now Vice President of the Upper Tribunal.

13. He rightly concluded that the ruling on the issue of whether a Section 146 notice was required was not a matter for the lower tribunal to determine. This is a view with which the present tribunal agrees particularly on a paper determination.
14. The tribunal had some reservations as to whether this matter should be listed for an oral hearing but has decided to proceed with an opinion based on the construction of the covenant .However, in the event of either party being dissatisfied with the decision and seeking to appeal the tribunal would possibly exercise its review powers under rule 53 of the First Tier Tribunal Procedure Rules 2013 to have the matter re determined by way of an oral hearing. .
15. Having seen the submissions advanced by each party the tribunal accepts the submission of the Respondent that if the administration charge is recoverable under lease 1 it is recoverable by express incorporation of the clauses in lease2 and 3 but the central question is whether clause 2(6) of lease 1 is wide enough to permit the charge to be made
16. In the case cited by the Respondent and in the decision of **Flat 3 10 Lennox Gardens** the tribunals decided the cases on whether the terms of the clause were wide enough to include the costs actually claimed .In the Lennox Gardens case the words used were “**for the purpose of or incidental to the preparation of a section 146 notice** “ As there was no evidence that the landlord intended to proceed by way of forfeiture but merely to obtain a money judgment for payment the costs were not allowed.
17. It is clear from the court order in this case, however, that a Section 146 notice was served since by clause 5 it has been set aside. Whether such a notice was correctly issued may be a question of debate.
18. Accordingly it is the view of the tribunal that the administration charges fall within the terms of the covenant in clause 2(6) as they appear to have been incurred in pursuing the Applicant up to the point of forfeiture and are recoverable in principle.

B Quantum

19. The Applicant contends that if costs are recoverable they should be limited to £500 (£480) on the basis that this would be sufficient to deal with the issues surrounding the notice.

20. In the view of the tribunal this appears to misunderstand the effect of the reasoning in **Freeholders of Marina 69** in that it appears that all costs incurred in contemplation of or in preparation of a Section 146 notice,, which would include court costs and tribunal hearing costs, provided they are done with a view to the ultimate service of a section 146 notice, are recoverable provided they are reasonable.
21. The Respondent has submitted a breakdown of the costs at pages 26-28 of the bundle. They include hourly rates, time spent and disbursements.
22. The tribunal has noted that the hourly rates claimed are those suitable for Central London (namely £409 at Grade A and £296 at Grade B). The tribunal has also noted that eh solicitors appear to be based in Liverpool which is where the High Court action was commenced.
23. The mere fact that the property is situated in London would not in the view of the tribunal justify the charging of Central London rates and accordingly the tribunal is only prepared to allow the hourly rates at the level appropriate for Liverpool.
24. This would mean that Mr Sweeney would be charged at £217 per hour, Mr Parkinson at £192 per hour and Ms Dobson at £118 as claimed
25. The tribunal considers that the costs recoverable therefore are
- (a) For Mr Sweeney £2387 plus VAT of 477.40
 - (b) For Mr Parknson £536.80 plus VAT of £107..36
 - (c) For Ms Dobson £177 plus VAT of £35.40
 - (d) Disbursements which amount to £717 including a tracing fee of £660 for which no details are provided, but it is assumed that some steps were taken to trace the Applicant
26. Assuming that the tribunal allows the tracing fee of £660the total amount recoverable would be £3817.60 plus £620.16VAT and the tribunal determines that sum as being payable.

Application under s.20C and refund of fees

27. The tribunal has decided not to make an order under section 20C in this case. as it appears that subject to some deductions the Respondent's claim is made out and it would not be just and equitable to deprive it of the costs in so far as they are allowable under the terms of the lease.

Name:
Peter
Leighton

Date:
14thNovember
2013

Appendix of relevant legislation

Landlord and Tenant act 1985

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 leasehold valuation 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;
 - (a) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;
 - (b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation 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.

Leasehold Valuation Tribunals (Fees)(England) Regulations 2003

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.

- (2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

- (1) In this Part of this Schedule “administration charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
 - (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
 - (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
 - (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.
- (2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.
- (3) In this Part of this Schedule “variable administration charge” means an administration charge payable by a tenant which is neither—
- (a) specified in his lease, nor
 - (b) calculated in accordance with a formula specified in his lease.
- (4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

- (1) An application may be made to a leasehold valuation tribunal for a determination whether an administration 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 amount which is payable,
 - (d) the date at or by which it is payable, and
 - (e) the manner in which it is payable.
- (2) Sub-paragraph (1) applies whether or not any payment has been made.
- (3) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
- (4) No application under sub-paragraph (1) may be made in respect of a matter which—
- (a) has been agreed or admitted by the tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.
- (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
- (a) in a particular manner, or
 - (b) on particular evidence,
- of any question which may be the subject matter of an application under sub-paragraph (1).