

1098



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

Case Reference : **BIR/00CN/LSC/2013/0023**

Property : **Flat 1/59 Warwick Road, Sutton Coldfield,
Birmingham B73 6XE**

Applicant : **A H Field (Holdings) Ltd**

Respondents : **(1) Regency Park (1998) Ltd
(2) FHL Nominees and FIT Nominees Ltd**

Date of Application : **28th August 2013**

Type of Application : **Sections 27A, 20B and 20C of the Landlord and
Tenant Act 1985 (the 1985 Act).**

Tribunal : **R. T. Brown FRICS
D. R. Salter LLB Hons**

Date and venue of : **17th December 2013**

Hearing : **On the papers submitted**

Dated : **21 MAR 2014**

DECISION

DECISION

1. The Tribunal determines that there is provision in the lease for the recovery of an individual lessee's debt to the Management Company by way of the maintenance charge payable by any or all of the other individual lessees.
2. The Tribunal determines that amount is unreasonable in relation to the nature and amount of the of the individual lessee's debt that was pursued.
3. The Tribunal determines that the demand for these legal costs was not issued or notified within the time limits prescribed by the Section 20B(1) of the Act.
4. The Tribunal, for the avoidance of any doubt, makes an order under Section 20C of the Act that in so far as the costs of these proceedings may be recoverable under the Lease they are not so recoverable.

REASONS FOR DECISION

The Application and Introduction

1. The Application relates to the collection of legal costs, incurred in the period 31st December 2009 to 2012 and to be collected in the maintenance charge year ending 31st December 2013.
2. The Applicant seeks determination of the following:
 - (a) Recoverability of legal costs incurred by way of the maintenance charge.
 - (b) If such costs are recoverable whether or not they are reasonable in amount.
 - (c) The application of section 20B of the Act to the amounts demanded.
 - (d) An application under Section 20C of the Act limiting the recoverability of the Management Company's costs of these proceedings.
3. Directions were issued on 4th October 2013 with a Further Directions Order (No2) on 23rd December 2013.

The Property and the Tribunal's inspection

4. The members of the Tribunal did not inspect the property.

The Law

5. The relevant law is set out below:

Landlord and Tenant Act 1985

Section 18 Meaning of "service charge" and "relevant costs"

- (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, improvement 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 period.*

Section 19 Limitation of service charges: reasonableness

- (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.
- (2) *Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.*

Section 20B Limitation of service charges: time limit on making demands.

- (1) *If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.*
- (2) *Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.*

Section 20C Limitation of service charges: costs of proceedings

- (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 leasehold valuation tribunal, or the Lands 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;*

- (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 Lands 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.*

Section 27A Liability to pay service charges: jurisdiction

- (1) *An application may be made to the appropriate tribunal 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 amount which is payable,*
 - (d) *the date at or by which it is payable, and*
 - (e) *the manner in which it is payable.*
- (2) *Subsection (1) applies whether or not any payment has been made.*
- (3) *An application may also be made to the appropriate tribunal for a determination whether if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and if it would, as to-*
 - (a) *the person by whom it would be payable,*
 - (b) *the person to whom it would be payable,*
 - (c) *the amount which would be payable,*
 - (d) *the date at or by which it would be payable, and*
 - (e) *the manner in which it would be payable.*

The Lease

- 6. The Tribunal was provided with a copy of the Lease dated 9th December 1998.
- 7. The parties original to the Lease are Fairclough Homes Limited (Freeholder) and Regency Park (1998) Ltd (Management Company) and A. H. Field (Holdings) Ltd (Lessee).
- 8. Under the Lease the Freeholder devolves responsibility for the management to Regency Park (1998) Ltd. Regent Park (1998) Ltd has appointed Ms J Aldridge of MPM Ltd as company secretary to manage the development.
- 9. The relevant provisions of the Lease are as follows:

Seventh Schedule (Covenants in respect of the maintenance charge)

ACCOUNT 3. The Management Company shall keep an account of the sums spent by it each year on the matters specified in the Eighth Schedule and shall as soon as

practicable after the end of each such year notify the lessee of the total amount of the sums so spent.

Eighth Schedule (Expenditure to be recovered by means of the Maintenance Charge)

LEASE OBLIGATIONS 1. All sums spent by the Management Company in and incidental to the observance and performance of the obligations on the part of the Management Company pursuant to the Six and Seventh Schedules.

SUNDRY FEES 2. All fees charges and expenses salaries wages and commissions paid to any Managing Agent Auditor Accountant Surveyor Solicitor or any other agent contractor or employee whom the Management Company may engage in connection with the carrying out of its obligations under the Leases including the costs of and incidental to the preparation of the estimates notices and accounts pursuant to the Seventh Schedule.

LITIGATION 9. The costs incurred by the Management Company in bringing or defending any actions or other proceedings against or by any person or organisation.

ADMINISTRATION 10. The costs of administering the Management Company including the costs of preparing and auditing accounts the printing and sending out notices circulars reports or accounts the holding of meetings and all fees payable to the Government or any other body and the proper expenses of the Directors and the Secretary.

Fourth Schedule (Lessee's Covenants with Fairclough and Management Company and other owners):

EXPENSES 14. To pay all expenses (including Solicitors' costs and Surveyors' fees) incurred by Fairclough incidental to the preparation and service of any notice under Section 146 of the Law of Property Act 1925 notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court.

The Hearing

10. The matter was considered with the agreement of the parties on the papers submitted.

The Applicant's Case

11. The Applicant says that the practice of the agents MPM Ltd is to instruct accountants to prepare the annual accounts. However such accounts are only issued to lessees upon request which does not accord with Clause 3 of the Seventh Schedule to the Lease.

12. In the accounts for the periods 31/12/2009 to 31/12/2012 the figure for 'Debtors' fluctuated. Until the Emergency General Meeting in 2013 no explanation was given as to what 'Debtors' comprised.
13. It was not normal practice to call annual general meetings. No meetings were convened and no notifications of the legal costs, incurred in connection with attempting to collect service charge arrears from one lessee, were given to the Applicant.
14. The Notice of the Emergency General Meeting on 2nd May which is dated 4th April 2013 does not disclose the extent or nature of these costs. Even if the accounts for the year to 31st December 2012 had been issued to lessees they would not have shown the extent of the legal costs incurred.
15. The Applicant Company did receive a telephone call on the day of the meeting to advise it was taking place. Unfortunately no-one was available to attend.
16. The amount in dispute is £158.69 in respect of the subject flat and is disputed for the following reasons:
 - (a) The costs referred to in the email from Jean Aldridge of MPM dated 9th May 2013 were incurred between 29th July 2009 and 24th October 2011. It is the Applicant's contention that Section 20B required the Respondents to notify the Lessees of the liability to the additional charge within 18 months of the costs being incurred. At no time prior to the AGM on 2nd May was such notice given.
 - (b) The wording of Clauses 1, 2, 9 and 10 of the Eighth Schedule to the lease make no provision for the recovery of debts from other lessees or of costs incurred in trying to recover those debts. In this regard the Applicant relies on *Stella House v Mears* [1989] 1 EGLR 65. Clause 9 is a vague attempt to encompass any actions or proceedings. However the Applicant submits that the lease should specify the exact nature of such proceedings.
 - (c) The Applicant believes it was unreasonable to incur total legal costs of £7,616.90 to recover a debt of £400.77. The attempts to collect monies from the defaulting lessee were neither reasonable nor proportionate. In this case 47 lessees are being asked to fund an unsuccessful action brought on behalf of the Respondents where those lessees had no control over the expenditure or even knowledge of the situation.

The Respondent's Reply

17. The Respondents say that the shareholders of the Management Company are notified of the completion of the company accounts in writing each year but copies of the accounts themselves are only issued on request in order to keep costs down.
18. Periodically the Respondents ask if anyone is interested in holding a meeting but get little or no response. It would seem pointless to incur the costs of a meeting if no one was interested in attending. The Applicant has never expressed interest.
19. Written Notice of the recent May AGM was issued and only 5 shareholders (out of 48) attended.

20. The history behind the incurring of the legal costs is complex and was related to the actions of one lessee who had failed to pay the maintenance charge.
21. The Respondent tried to call as many shareholders as possible. The Applicant was not able to send anyone to attend nor did it send a proxy.
22. The Respondent then set out in some detail the history behind the legal costs of £7,616.90 and its attempted recovery of the maintenance charge of £400.17 from that lessee.
23. At the May 2013 AGM it was unanimously voted that the costs be split between everyone.
24. The demand for this money to be paid by all 48 leaseholders has arisen due to a vote taken by the shareholders.
25. The Respondents acknowledge some concern over the provision in the Lease for the recovery of these costs.
26. Under Paragraph 14 of the Fourth Schedule of the Lease Fairclough Homes Ltd can recover costs associated with debt collection but the Management Company is not mentioned.
27. Paragraph 9 of the Eighth Schedule of the Lease provides the Management Company can recover expenditure incurred in bringing or defending any actions or other proceedings against or by any person or organisation by means of the Maintenance Charge.
28. In conclusion the Respondent says the legal costs incurred were reasonable when the circumstances are fully considered.

Further Directions and the parties' responses

29. In response to the further Directions the Respondent explained that there were no amounts included for legal costs for any of the years in dispute namely the years ending 31st December 2009 to 2012.
30. All of the invoices for legal costs totalling £7,616.90 were posted to the individual lessee's accounts and therefore shown on the balance sheet as a debt. This amount was credited to that Lessee's account following the decision of the shareholders to split the costs between all shareholders. The individual costs of £158.69 were invoiced to each shareholder on 1st July 2013.
31. A reconciliation of all the legal costs incurred together with supporting invoices was included in the response.
32. In reply to the Respondent's further submission the Applicant said the response to Direction 6(3) – (Request for copies of Demands issued to the Applicant) was not considered satisfactory.

The Tribunal's Deliberations

33. The Tribunal considered all the relevant written evidence (as summarised above) in its deliberations.

The Lease

34. The Tribunal find that Paragraph 9 of the Eighth Schedule of the Lease is very broadly worded and is wide enough to allow the the Management Company to recover the legal costs incurred by way of the Maintenance Charge. Paragraph 9 is headed LITIGATION and this necessarily colours the interpretation of that paragraph and the costs to which it relates; an interpretation that in the Tribunal's judgement embraces the incurring of legal costs. As a consequence it concluded that this finding was not inconsistent with *Stella*.

Company resolution

35. There is no provision in the Lease empowering the Management Company to make a resolution the effect of which is to vary the terms of the Lease. The resolution made at the May 2013 AGM for the purposes of recovering the legal costs is of no effect.

Reasonableness of the amount of legal costs incurred

36. The Tribunal is persuaded by the Applicant's argument that the amount of the legal costs incurred is unreasonable in relation to the nature and amount of the individual lessee's debt and the other remedies for recovery available to a Landlord.

Section 20B of the Act

37. The Tribunal finds as a matter of fact from the invoices provided by the Respondent that the legal costs in dispute were all incurred between 29th July 2009 and 24th October 2011, an invoice for which was issued to individual lessees on the 1st July 2013.
38. It follows therefore, even if it was accepted that notice of these costs was given at the AGM on 2nd May 2013, that all of these costs were incurred (the last invoice is dated 24th October 2011) more than 18 months after the cost (date of invoice) had been incurred. Consequently these costs are not recoverable under section 20B(1) of the Act.

Section 20C of the Act

39. The Tribunal concludes that the Applicant was justified in bringing the action. Accordingly, it is appropriate that an Order is made under section 20C preventing the Respondent, so far as provision is contained for preventing the Respondent from recovering any costs of these proceedings by way of the maintenance charge provisions in the Lease.

Appeal Provisions

40. If either party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties (rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

Robert T Brown
Chairman