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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/22UD/LSC/2014/0014**
Property	:	**Flat 6 Darlington Court, Broomwood Gardens, Brentwood, Essex CM15 9LR**
Applicant	:	**Tony Cuff**
Respondent	:	**Sinclair Gardens Investments (Kensington) Ltd. Represented by Mr. Wijeyaratne of Counsel (Wannops)**
Date of Application	:	**2nd January 2014**
Type of Application	:	**To determine reasonableness and payability of service charges (Ss. 19 and 27A Landlord and Tenant Act 1985 ("the Act"))**
The Tribunal	:	**Bruce Edgington (lawyer chair) Evelyn Flint DMS FRICS IRRV Cheryl St Clair MBE BA**
Date of and venue of hearing	:	**6th May 2014 at Mary Green Manor Hotel, London Road, Brentwood, Essex CM14 4NR**

DECISION

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1. Following an agreement reached between the parties on the morning of the hearing, the terms of which are set out below, the application was withdrawn with the consent of the Tribunal.

2. The Tribunal makes an Order pursuant to Section 20C of the Act preventing the Respondent from claiming any cost of representation before this Tribunal as part of any future service charge demand.

Reasons

Introduction

3. The Applicant is the long leaseholder of the property and the Respondent is the freeholder. The Applicant sought a determination of the insurance premiums for the years commencing 20th November 2011 and 2013, the premium for the year 2012 having been paid.

4. The Applicant also asks that an Order be made by the Tribunal under Section 20C of the 1985 Act preventing the Respondent from recovering any costs incurred by it in these proceedings from being included in any future service charge claim.

5. Rule 4 of **The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013** ("the rules") requires a Tribunal to draw parties' attention to alternative dispute resolution. At the commencement of the hearing and after the Tribunal had inspected the property, the Tribunal chair pointed out to the parties that as it was the management company's agent which had absconded with the lessees' money and not the management company, the shortfall in insurance premiums was going to have to be met by the lessees in any event. The original debt appears to have been due from the management company to the landlord and the management company is, in effect, the lessees.

6. The parties were then invited to discuss the possibility of a settlement of the question of whether insurance premiums are to be paid, leaving the question of reasonableness to the Tribunal. There was a relatively short discussion outside the Tribunal hearing room and, to the parties' great credit, there was compromise on both sides and settlement was reached on all matters save for the question of whether there should be a section 20C order relating to the landlord's costs of representation before the Tribunal.

7. The Tribunal was asked to record the agreement which was:

    - The lessees/management company agreed that the 2011 insurance premium was payable and the Respondent agreed that the premium would be reduced by 10%
    - The lessees/management company agreed that the 2013 premium was payable as asked
    - The management company would take over insurance from now on

8. Unfortunately the question of costs of representation could not be agreed and the hearing therefore had to proceed but only to deal with that discrete issue. Unfortunately, it is necessary to briefly touch on the facts as they are relevant to any discussion about the justice of making such an order.

9. The application form simply says that the Applicant challenges "*Insurance premium levied by Freeholder for the period commencing 20 Nov 2011*" with similar wording for the 2013 premium. It asks the Tribunal to make "*a determination as to whether the Freeholder is entitled to demand from the leaseholder an insurance premium effective November 2011, by way of invoice and accompanying correspondence dated 18th June 2013*". The wording for the 2013 premium is slightly different and says "*A determination as to whether the insurance available through the landlord's nominated or approved insurer is unsatisfactory in any respect, or the premiums payable for such insurance are excessive (where the lease requires the leaseholder to insure with the landlord's nominated or approved insurer)*".

10. In 2011 the freeholder owner was the Respondent and the management company was Ongar Road Management (Darlington Court) Ltd. ("ORM") whose managing agents were Walkers Professional Property Services Ltd. A useful chronology is as follows:-

1st December 2011	copy insurance certificate for 2011 sent to Walkers
4th January 2012	demand for payment sent by landlord to Walkers
2nd January 2013	demand for payment of 2012 premium to Walkers
6th June 2013	landlord put on notice that Walkers defrauded ORM
18th June 2013	landlord writes to leaseholders asking for premiums
26th June 2013	P G Ashton & Chater appointed new agent for ORM
2nd July 2013	landlord sends service charge demand to leaseholders
21st October 2013	2012 premium paid by ORM

The Lease

11. A copy of the counterpart lease for the property is in the papers. It is dated 22nd November 1985 and is for a term of 99 years from the 24th June 1985 with an increasing ground rent. As has been said, it is a tri-partite agreement. The covenants require the management company to maintain the property and the leaseholders must pay their agreed shares of the service charges to the management company. That company cannot unreasonably refuse to register an assignee of the leasehold interest as a member. The landlord agrees to grant the management company a long lease of the common parts.

12. Part II of the Schedule sets out the obligations of the management company which include, at clause 8(e), "*to keep Darlington Court insured in its full reinstatement value such value to be determined with the landlord's approval....with an insurance company approved by the Landlords...and to endorse on the policy a note of the Landlords' interest therein...*".

13. Part I of the Schedule sets out the details of what is called 'The Darlington Court Management Scheme' which includes, at clause 5(2), these words "*If the Management Company shall fail to or shall become unable to carry out its obligations to the Landlords under the Scheme the Landlords may*

by notice in writing to the Management Company and each Owner (addressed to his flat) themselves take over one or more or all of such obligations and in that event all sums payable to the Management Company...shall be payable to the Landlords...".

14. Clause 5(3) of Part I provides the additional power to the landlord to serve notice in writing on the management company and each leaseholder that it is going to take over any or all of the management company's obligations for a specified or indeterminate time. In the case of insurance, this would mean that the leaseholders would pay the landlord direct for the premiums. There is some suggestion in the papers that this happened in respect of insurance but no evidence has been produced of any notice given and the premiums clearly have not been collected directly from the leaseholders until the facts leading to this application arose.

The Law

15. There is no dispute that an insurance premium is a service charge. A tenant may apply to this Tribunal pursuant to Section 27A of the 1985 Act, for a determination as to whether a service charge is reasonable and, if it is, as to the amount which is payable.

16. Section 20C of the 1985 Act gives a Tribunal the ability to make an order preventing a landlord from recovering the cost of representation before this Tribunal as part of a future service charge demand. It also has the power to order re-imbursement of fees paid.

The Hearing

17. The hearing was attended by Mr. Turner from Flat 3 who was, in effect, substituting for the applicant who was unable to be present. He was represented by Mr. Andrew Chater from the new managing agents appointed by the management company. Mr. Wijeyaratne of counsel represented the Respondent and he was accompanied by the witness Mark Kelly.

18. The Applicant's representative said that he wanted to pursue the section 20C order. Counsel responded by suggesting that the Tribunal had no jurisdiction in view of the agreement. The Tribunal did not accept that position. Mr. Wijeyaratne therefore continued and put his case which was, in effect, that the application was being pursued because of a misunderstanding of the law and now that the Tribunal had given its indication and agreement had been reached, the correctness of this case was self evident.

Conclusions

19. The Tribunal must look at the justice of the case and determine whether it is just and equitable to make an order under section 20C. It must also remember that despite the much wider jurisdiction to make costs orders in the rules, the basic premise is that proceedings before this Tribunal continue to be a 'no costs' regime.

20. It is not possible to guess how the Tribunal would have determined the issues in this case but there were certainly a number of difficulties which the Respondent would have had to face. For example:-

- The 2011 insurance was purportedly put into effect without payment or any arrangement for payment. The Tribunal would have had some difficulty in accepting that any insurance company would have been willing to do this which would have put compliance with the 18 month rule very much into question.
- The Respondent simply refused to provide any information about whether the agents H W Wood received any commission. They clearly did work for the Respondent or its agent and the chances of them doing this work for nothing are remote. The Tribunal may well have drawn an inference that a commission was paid which would have brought the case of **Akorite v Marine Heights (St. Leonards) Ltd.** [2011 UKUT 255 (LC) into consideration. This case was not within counsel's bundle of cases produced for the Tribunal for some reason.
- The Tribunal still had a question mark over the issue of why the landlord was insuring rather than the management company. There was no evidence of any notice having been given at the time this arrangement commenced and no evidence of prior payments direct from the lessees to the Respondent. Equally, there was little evidence to suggest that the management company rather than its agents was unable to carry out its obligations under the terms of the leases.

21. It must also be born in mind that the negotiations did produce concessions from the Respondent which included a reduction in premium for 2011 and an agreement that it would not insure in the future.

22. Talking all these matters into account and bearing in mind the fee which the applicant has had to pay for this application which is not being refunded, it is the Tribunal's decision that there should be an order under section 20C of the 1985 Act.

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Bruce Edgington
Regional Judge
12th May 2014