



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

**Case Reference** : CHI/29UM/LSC/2014/0013

**Property** : 9 & 3 North Quay  
Conyer  
Sittingbourne  
Kent ME9 9HL

**Applicants** : Mr. Andrew Philip Kemp  
Mr. Paul Smedley

**Representative** : None

**Respondent** : Conyer Quay (Management) Limited

**Representative** : Fell Reynolds

**Type of Application** : Liability to pay service charges Section 27A  
Landlord and Tenant Act 1985  
Limitation of costs Section 20C

**Tribunal Members** : Judge R. Norman  
Mr. R. Athow FRICS MIRPM  
Mr. P.A. Gammon MBE BA

**Date and venue of hearing** : 15<sup>th</sup> July 2014  
Teynham Village Hall

**Date of Decision** : 23<sup>rd</sup> July 2014

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DECISION

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## **Decision**

1. The following are not recoverable through the service charges:
  - (a) The litigation expenses incurred by Conyer Quay (Management) Limited (“the Respondent”) and the costs ordered to be paid by the Respondent in relation to the litigation concerning the defence to the application for an injunction.
  - (b) The loan repayments and interest in respect of loans obtained to assist with the payment of part of the costs in relation to the litigation concerning the defence to the application for an injunction.
  - (c) The penalties paid to HMRC in respect of the late filing of accounts.
2. The premiums in respect of the Directors and Officers insurance are recoverable through the service charges. The premiums were reasonably incurred and are payable by the lessees.
3. An order is made under Section 20C of the Landlord and Tenant Act 1985 (“the 1985 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 Mr. A.P. Kemp and Mr. P Smedley (“the Applicants”).

## **Background**

4. Mr. A. P. Kemp made an application and Mr. P. Smedley, at his request, has been joined as an applicant in these proceedings. The Applicants seek a determination under Section 27A of the 1985 Act as to whether service charges are payable in respect of the following:
  - (a) The year 2007-2008
    - (i) Companies House penalties £100
    - (ii) Director’s insurance £469.38
  - (b) The year 2008-2009
    - (i) Companies House penalties £700
    - (ii) Director’s insurance £474.38
  - (c) The year 2009-2010  
Director’s insurance £477.38
  - (d) The year 2010-2011
    - (i) Legal fees £51,483.72
    - (ii) Director’s insurance £409.13
  - (e) The year 2011-2012
    - (i) Legal fees £75,837.87

- (ii) Director's insurance £309.50
- (iii) Interest on loan £205.69

- (f) The year 2012-2013
  - (i) Legal fees £47,430.42
  - (ii) Director's insurance £309.50
  - (iii) Interest on loan £397.20

- (g) The year 2013-2014
  - (i) Director's insurance £470.00
  - (ii) Loan repayments £7,500

- (h) The year 2014-2015  
Legal fees £80,000 which are legal costs of the third party.

5. The Applicants also seek an order under Section 20C of the 1985 Act.

### **Inspection**

6. On 15<sup>th</sup> July 2014 the Tribunal inspected North Quay, Conyer, Sittingbourne, Kent ME9 9HL ("the subject property"). Present were the Applicants, Mr. Baker and Mr. Sunderland from Fell Reynolds representing the Respondent and a number of lessees of parts of the subject property.

7. Mr. Bowsher provided a colour copy of a plan (a monochrome copy of which had been included in the hearing bundle) showing the subject property, the access road running through it and the houses, boatyard and land beyond the subject property belonging to the Spears family.

8. Of particular interest were the access road and the security mechanism on the gates at the entrance. We were told that the only access to the Spears' property, consisting of two houses, a commercial boatyard and land, was along the access road through the subject property. The entrance gates comprise a pedestrian gate and electrically operated double gates affording vehicular access. The pedestrian gate, we were told was open from sunrise to sunset but outside those times access was by means of a code operated keypad. The vehicular gate is controlled by a key fob or by keying in a number which connects with any one of the properties and the occupier of that property is then able to operate the opening mechanism. There is also a 'tradesmans' button which if pressed will open the gate. This should be available for only part of the day but we were told that there was a software problem and that as a result the button could be used to open the gate at any time and by anybody. As vehicles leaving the subject property approach the gates they open automatically.

### **Hearing**

9. Present at the hearing were the Applicants, Mr. Baker, Mr. Sunderland and a number of lessees.

## Reasons

10. The Tribunal considered all the documentary evidence produced by and on behalf of the parties and all the evidence given and submissions made at the hearing. Findings of fact were made on a balance of probabilities.

11. We explained that our intention was to look at the charges which were in dispute and to approach the matter in a two stage process; considering first of all whether the charges were recoverable through the service charges under the provisions of the leases and if they were then secondly to consider whether the charges were reasonably incurred.

12. It was agreed by the parties that the leases of the subject properties are in common form and our attention was drawn to the specimen lease. The Respondent is referred to in the lease as the Manager and, as was agreed by the parties, is in the position of a landlord. The Manager has obligations to, for example, repair the Estate Access Areas. The lessee has the obligation to pay to the Manager service charges, referred to in the lease as the lessee's proportion of the maintenance expenses.

13. The following provisions in the lease were referred to in these proceedings:

(a) The lessee has to observe and perform the obligations on the part of the lessee set out in parts one and two of the Eighth Schedule to the lease.

### "THE EIGHTH SCHEDULE

Covenants by the Lessee

#### PART ONE

(Covenants Enforceable by the Lessor and the Manager)

1. To pay to the Manager or its authorised agent the Lessee's Proportion at the times and in the manner herein provided...
4. To pay and discharge all rates taxes assessments charges duties and other outgoings whatsoever whether parliamentary parochial or of any other kind which now are or during the Term shall be assessed or charged on or payable in respect of the Demised Premises or any part thereof or by the landlord tenant owner or occupier thereof
5. To keep the Manager and the Lessor indemnified in respect of charges for other services payable in respect of the Demised Premises which the Lessor or the Manager shall from time to time during the Term be called upon to pay such sums to be repaid to the Lessor or the Manager on demand..."

(b) The Lessee's Proportion is defined as "the proportion of the Maintenance Expenses payable by the Lessee in accordance with the provisions of the Seventh Schedule".

(c) Paragraph 1 of Seventh Schedule provides that:

“The Lessee’s Proportion means the Proportion of the amount attributable to the costs in connection with the matters mentioned in Part “A” of the Sixth Schedule and of whatever of the matters referred to in Part “B” of the said Schedule are expenses properly incurred by the Manager which are relative to the matters mentioned in Part “A” of the said Schedule”

(d) The Maintenance Expenses are defined as “the moneys actually expended or reserved for periodical expenditure by or on behalf of the Manager or the Lessor at all times during the Term in carrying out the obligations specified in the Sixth Schedule”.

(e) The Manager has to observe and perform the obligations on the part of the Manager set out in the Tenth Schedule to the lease.

“THE TENTH SCHEDULE  
(Covenants on the part of the Manager)

1. To carry out the works and do the acts and things set out in the Sixth Schedule as appropriate to each type of dwelling.

PROVIDED THAT:-

...1.2 Nothing in this covenant contained shall prejudice the Manager’s right to recover from the Lessee or any other person the amount or value of any loss or damage suffered by or caused to the Manager or the Maintained Property by the negligence or other wrongful act or default of such person...

2. To use all reasonable endeavours to recover the contributions towards the cost of the matters referred to in the Sixth Schedule which may be due from the lessees of any of the Dwellings

3. The Manager shall ensure that the reserve fund or funds referred to in the Sixth Schedule shall be kept in a separate trust fund account and any interest on or income of the said fund shall be held by the Manager in trust for the lessees of the Dwellings and shall only be applied in connection with the matters detailed in the Sixth Schedule...

(f) The Sixth Schedule is in two parts:

“The Maintenance Expenses  
PART “A””

1. Repairing maintaining inspecting and as necessary reinstating or renewing the Service Installations used by the Dwellings in common

2. Repairing rebuilding maintaining inspecting decorating and lighting the Estate Access Areas the Boat Store the Slipway the Bin Store the Weather boarding and the Visitors Parking Spaces

3. All reasonable and proper costs incurred by the Lessor insuring and keeping insured all buildings comprising part of the Maintained Property

PART "B"

(Costs applicable to Part A of this Schedule)

1. Insuring any risks for which the Manager may be liable ... as the owner of the Maintained Property or any part thereof in such amount as the Manager shall reasonably think fit...

3. Paying all rates taxes duties charges assessments and outgoings whatsoever (whether parliamentary parochial local or of any other description) assessed charged or imposed upon or payable in respect of the Maintained Property or any part thereof except insofar as the same are the responsibility of the Lessee or the individual transferee or lessee of any of the Properties...

7. Generally managing and administering the Maintained Property and protecting the amenities of the Maintained Property and for that purpose if necessary employing a firm of managing agents or consultants or similar and the payment of all costs and expenses incurred by the Manager:-

7.1 in the running and management of the Estate and the collection of the rents and service charges and in the enforcement of the covenants and conditions and regulations contained in the leases of any of the Dwellings and any Estate Regulations

7.2 in making such applications and representations and taking such action as the Manager shall reasonably think necessary in respect of any notice or order or proposal for a notice or order served under any statute order regulation or bye-law on the Lessee or any under-lessee of the Properties in the Estate or on the Manager in respect of the Estate or the curtilages thereof or all or any of the houses flats garages or parking places therein and

7.3 in the preparation for audit of the service charge accounts...

10. Complying with the requirements and directions of any competent authority and with the provisions of all statutes and all regulations orders and bye-laws made thereunder relating to the Estate insofar as such compliance is not the responsibility of the lessee of any of the Dwellings...

14. All other reasonable and proper expenses (if any) reasonably and properly incurred by the Manager in and about the maintenance and proper and convenient management and running of the Estate

including in particular but without prejudice to the generality of the foregoing any expenses incurred in rectifying or making good any inherent structural defect in the Maintained Property (except in so far as the cost thereof is recoverable under any insurance policy for the time being in force or from a third party who is or who may be liable therefor) any interest paid on any money borrowed by the Manager to defray any expenses incurred by it and specified in this Schedule any costs imposed on the Manager in accordance with Paragraph 4 of the Seventh Schedule any legal or other costs reasonably and properly incurred by the Manager and otherwise not recovered in taking or defending proceedings (including any arbitration) arising out of any lease of any part of the Estate or any claim by or against any lessee or tenant thereof or by any third party against the Manager as owner lessee or occupier of any part of the Estate”

(g) The Maintained Property is defined as “those parts of the Estate which are more particularly described in the Second Schedule and the maintenance of which are the responsibility of the Manager”.

(h) By clause 6.3 it is agreed and declared that nothing contained in the lease shall be construed as entitling the Lessee to require that all or any of the covenants contained in the lease shall be imposed upon or enforced in respect of any property adjoining or neighbouring the Estate.

#### **Directors and Officers insurance**

14. The case as presented on behalf of the Respondent was that the Respondent relied on Part B paragraphs 1 and 14 of the Sixth Schedule to the lease as justification for claiming the cost of Director and Officers insurance through the service charges. The Directors are volunteers, they are elected from the shareholders who are also leaseholders, they need to seek indemnity, there is no financial reward and it is reasonable to obtain and pay for the insurance in order to attract shareholders to become directors and for their added protection.

15. The Applicants submitted that the insurance obtained went further than was allowed by the lease in that it should relate only to the estate and not to the company generally. However, the Applicants did not challenge the premiums paid as being unreasonable and did not know whether the reduction in cover as they suggested would result in lower premiums.

16. The Tribunal was satisfied that the premiums in respect of the Directors and Officers insurance are recoverable through the service charges under paragraph 1 and paragraph 14 of Part B of the Sixth Schedule to the lease as set out in paragraph 13(f) above and that the expenses of obtaining such insurance were properly incurred by the Respondent and relative to matters mentioned in Part A of the Sixth Schedule.

## **Companies House Penalties**

17. The case as presented on behalf of the Respondent was that the Respondent relied on Part B paragraphs 3, 10 and 14 of the Sixth Schedule to the lease as justification for claiming the Companies House Penalties through the service charges. It was explained that when Fell Reynolds took over as managing agents they had difficulty obtaining the necessary accounts and information from the previous managing agent who had ceased trading and, as a result, by the time the accounts were received the deadline for filing returns had passed and penalties were imposed. The Respondent is a dormant company with no monies of its own and, as the ground rents are a peppercorn, there is no income from ground rents. The Respondent had no means of providing the money to pay the penalties and in any event these were small sums and the cost of pursuing them either by trying to claim them from the previous managing agent or accountants or challenging HMRC would have been disproportionate. Since those penalties were incurred, the accounts have been filed on time by Fell Reynolds.

18. The Applicants' view was that there had been a blurring of company charges and lease charges. The Respondent's case was that the paragraphs relied on were catch all provisions but the Applicants submitted that the penalties should not be paid by the lessees. Penalties were not mentioned in the paragraphs relied on by the Respondent. There were references to expenses which were reasonably and properly incurred. These were not. They were penalties and in any event the penalties were in relation to the running of the company not the estate. Whoever was responsible for putting together the accounts was at fault and should pay the penalties.

19. Mr. Baker explained that even if the penalties were not part of running the estate, at that time the service charge accounts were the company accounts and it was only since Fell Reynolds took over that the accounts were split in two.

20. The Tribunal was not satisfied that the penalties could be claimed through the service charges. The paragraphs relied on by the Respondent referred to costs in complying with requirements and costs properly incurred. They did not refer to penalties imposed as a result of failing to comply. As there were difficulties, a request could have been made for an extension of time to file accounts but there was no evidence that any such request had been made. Ultimately, the responsibility for ensuring that the accounts are filed in time rests with the company directors.

## **Litigation expenses**

21. This category concerns the unsuccessful defending of the application for an injunction, the polytunnel planning appeal and the brickwork land appeal and includes the Respondent's legal fees, the costs awarded to be paid by the Respondent, the interest on a loan obtained to pay part of the costs and the repayment of that loan.



22. The case as presented on behalf of the Respondent was that the Respondent relied on Part B paragraphs 7, 7.2 and 14 of the Sixth Schedule to the leases as justification for claiming these expenses through the service charges.

23. It was pointed out by the Tribunal that all the paragraphs in Part B of the Sixth Schedule relate to Part A of the Sixth Schedule. This is stated in the headings of Part A and Part B and in the Seventh Schedule.

24. It appeared that Mr. Baker and Mr. Sunderland had taken the view that Part B of the Sixth Schedule, and in particular paragraph 14, provided justification for claiming all the disputed charges but had not appreciated the relationship between Part A and Part B of the Sixth Schedule. Therefore they were given the opportunity over the lunchtime adjournment to consider the position.

25. After lunch Mr. Baker stated that that was the danger in reading only part of the lease. As justification for charging the litigation expenses to the service charges he submitted that:

(a) The words "but without prejudice to the generality of the foregoing" in paragraph 14 of Part B of the Sixth Schedule could override the previous provision.

(b) However, if he were wrong about that then it was clear that the reference to maintaining the Estate Access Areas in paragraph 2 of Part A of the Sixth Schedule means in the physical sense but also the rights of access to the Estate as well. The Spears' increase of the usage of the maintained area, the roadway and access to it referred to this.

(c) Referring to paragraphs 1 and 4 of Part One of the Eighth Schedule, parochial charges could include court action.

(d) Referring to paragraph 5 of Part One of the Eighth Schedule the Manager could be indemnified for other services.

(e) Paragraph 1.2 of the Tenth Schedule gave the Respondent the right to recover from the lessees the amount or value of any loss or damage suffered by or caused to the Manager or the Maintained Property by the negligence or other wrongful act or default of such person.

26. The following further submissions were made by Mr. Kemp and Mr. Baker:

(a) Mr. Kemp submitted that Mr. Baker was trying to extend Part A of the Sixth Schedule which is the definition and that he could not get away from Part A.

(b) Mr. Baker submitted that maintaining the accessway is in Part A.

(c) Mr. Kemp did not agree that the litigation expenses arose from maintaining the accessway. They arose from an action brought by the Spears in response to an unlawful action of the Respondent.

(d) Mr. Baker stated that the action was not an action against the Spears. It was not about denying access. It was about maintaining an access route for the good of those living there.

(e) Mr. Kemp stated that evidence had never been provided to show that that was necessary. In fact it was not necessary and had been totally ineffective. The passcode had never been changed and all the locals knew the passcode, so

could gain access whenever they wished. All that was needed to be done to restore security was a regular change of passcode to the original system; details of which could be given to all parties who have a legitimate right of access. The position now was inferior to when the action started. Now, at the push of a button vehicular access can be obtained whereas it could not before. Even if a change was necessary, and the issue was about maintaining access, the correct way to proceed was not to prompt litigation from another user who happened to share access.

(f) Mr. Baker stated that the action was taken as a result of requests both formally and informally to maintain the security of the accessway. The Respondent's actions were authorised by its shareholders at a meeting but under the lease the Respondent had a positive obligation to maintain the accessway and it could be said that a vote was not necessary.

27. It was agreed that there had been negotiation with the Spears.

28. The Tribunal considered the evidence and the submissions and made the following determinations:

(a) The words "but without prejudice to the generality of the foregoing" in paragraph 14 of Part B of the Sixth Schedule could not override the provision in the Seventh Schedule that "The Lessee's Proportion means the Proportion of the amount attributable to the costs in connection with the matters mentioned in Part "A" of the Sixth Schedule and of whatever of the matters referred to in Part "B" of the said Schedule are expenses properly incurred by the Manager which are relative to the matters mentioned in Part "A" of the said Schedule". That is all that the lessees are obliged to pay through the service charges. The costs in Part "B" are applicable to Part "A" and it is only costs which come within Part "A" which are payable by the lessees through the service charges. We were not satisfied on the evidence that the litigation expenses came within Part "A" of the Sixth Schedule to the leases.

(b) Paragraph 2 of Part "A" of the Sixth Schedule does provide for maintaining the Estate Access Areas but the litigation costs were not incurred in maintaining the Estate Access Areas. They were incurred in unsuccessfully defending an action for an injunction brought by the Spears.

(c) No authority was produced for the submission that in some way the litigation charges could come within the definition of parochial charges and we were not persuaded that they could.

(d) Paragraph 5 of Part One of the Eighth Schedule does provide that the Manager be indemnified in respect of other charges for services payable in respect of the Demised Premises which are defined as the individual Dwellings described in the Third Schedule. However, there was no evidence that the litigation charges were charges for services payable in respect of the Demised Premises.

(e) Paragraph 1.2 of the Tenth Schedule gives the Respondent the right to recover from the lessees or any other person the amount or value of any loss or damage suffered by or caused to the Manager or the Maintained Property by the negligence or other wrongful act or default of such person. However, the loss or damage suffered by or caused to the Respondent was not by the negligence or other wrongful act or default of the lessees from whom the Respondent is trying to recover.

## **Whether the charges were reasonably incurred**

29. Evidence was given and submissions were made about whether the charges were reasonably incurred but as the Tribunal has determined that only the premiums in respect of the Directors and Officers insurance are recoverable through the service charges it is only that part of the charges where reasonableness has to be determined. The premiums were not challenged and we found that they were reasonably incurred. They are payable by the lessees through the service charges.

## **Section 20C Application**

30. There is before us an application for an order under Section 20C of the 1985 Act.

31. Mr. Baker submitted that the Respondent could not make a rights issue and could not get money other than through the service charges, which he considered was the correct course to take. The application was vexatious. The whole matter had been brought about unnecessarily. The Respondent had acted wholly responsibly on the advice of lawyers. Also, there comes a point when if a party withdraws then automatically that party becomes liable for the other party's legal costs as well as its own.

32. Mr. Kemp took exception to the Respondent's initial reference to the application as being vexatious and submitted that the cost of these proceedings should not be passed on to the lessees.

33. We find that it is just and equitable in the circumstances to make an order under Section 20C of the 1985 Act because the Applicants were justified in bringing these proceedings to clarify the position and the Tribunal found in their favour in respect of almost all the matters in dispute.

## **Appeals**

34. 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.

35. 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.

36. 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.

37. 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)