

12239



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

Case reference : LON/00AU/LSC/2016/0410 &
LON/00AU/LSC/2017/0079

Property : Ground Floor Flat, 13-14 Duncan
Terrace, London N1 8BZ

Applicant : Mr B Kennedy

Representative : In person

Respondents : LON/00AU/LSC/2016/0410
(1) 13-14 Duncan Terrace Limited
(2) Warwick Estates Property
Management Limited
LON/00AU/LSC/2017/0079
(1) Dr Micheal Villaverde
(2) Dr Anna Dempster
(3) Dr Craig Stevens

Representative : Bradys for Warwick Estates
Property Management Limited
Other respondents in person

Type of application : For the determination of the
reasonableness of and the liability
to pay service charges

Tribunal members : Mr J P Donegan (Tribunal Judge)
Mrs S Redmond MRICS (Valuer
Member)

**Date and venue of
paper determination** : 25 July 2017
10 Alfred Place, London WC1E 7LR

Date of decision : 28 July 2017

DECISION

Decisions of the tribunal

The applications dated 30 October 2016 and 3 March 2017 are struck out pursuant to rule 9(3)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ('the 2013 Rules').

The background and procedural history

1. The applicant is the long leaseholder of Ground Floor Flat, 13-14 Duncan Terrace, London N1 8BZ ('the Flat'). 13-14 Duncan Terrace Limited ('13-14DTL') is the freeholder of 13-14 Duncan Terrace ('the Building') and the Warwick Estates Property Management Limited ('WEPML') is the former managing agent of the Building.
2. The Tribunal has received two received applications under section 27A of the Landlord and Tenant Act 1985 ('the 1985 Act'), both from the applicant. The first was dated 30 October 2016 and sought a determination of service charges payable for the years ended 2009, 2013, 2014, 2015 and 2016 ('the First Application'). The second application was dated 3 March 2017 and sought a determination for the years ended 2010, 2011, 2012, 2013, 2014, 2015 and 2016 ('the Second Application').
3. Both applications named Dr Micheal Villaverde, Dr Anna Dempster and Dr Craig Stevens as the respondents. Dr Villaverde and Dr Dempster are or were directors of 13-14DTL and Dr Stevens is a director of WEPML.
4. The First Application was listed for a case management conference ('CMC') on 6 December 2016, when directions were issued. These substituted 13-14DTL as the first respondent and WEPML was added as a second respondent, with its consent.
5. There has been no application to add or substitute 13-14DTL or WEPML as respondents to the Second Application. This means the respondents in that case are still Dr Villaverde, Dr Dempster and Dr Stevens.
6. The First Application was listed for a full hearing on 23 March 2017. In a letter dated 15 March 2017 WEPML's solicitors, Bradys, informed the Tribunal that their client was no longer instructed to manage the Building. They asked the Tribunal to consider striking out the case against WEPML. The Tribunal responded in a letter dated 15 March 2017, declining this request.

7. The hearing on 23 March 2017 was adjourned, in the light of the change of management, the number of new issues raised by the applicant (described as “*mission creep*”) and the cross over between the First and Second Applications. Further directions were issued and both applications were listed for a CMC on 30 May 2017. Paragraph 3 of the directions provided:

“For guidance, at the Case Management Conference the Tribunal expects to consider joining the two applications, so that they can be heard together, add any parties wishing to be joined, consider other matters arising, and make detailed Directions relating to new statements of case and evidence for the resumed hearing in consultation with the parties.”

8. In an email to the Tribunal dated 23 May 2017, the applicant stated that its claim was now solely against WEPML and asked for disclosure of additional documents. He also asked that the CMC be put on hold. The Tribunal responded in a letter dated 25 May 2017, stating that the request for documents would be considered at the CMC. It was clear from this letter that the CMC would remain effective.
9. The applicant sent a further email to the Tribunal on 26 May stating “*Given the extent of the change in the overall situation (not least that we have finally managed to remove WEPML as property manager), I think it prudent therefore to suspend this tribunal case.*”
10. Neither the applicant nor 13-14DTL attended the CMC on 30 May 2017, which was heard by Judge Vance. WEPML was represented by counsel, Mr Charles Sinclair. The Tribunal gave notice that it was minded to strike out the applications on the grounds that the applicant had failed to co-operate such that it could not deal with the proceedings fairly and justly. It also gave further directions, which included provision for the parties to file and serve representations on whether the applications should be struck out.
11. The Tribunal decided whether to strike out the applications on paper, without an oral hearing, on 25 July 2017.
12. The relevant legal provisions are set out in the Appendix to this decision.

The issues

13. The only issues to be determined by the Tribunal are whether the First and/or Second Application should be struck out pursuant Rule 9(3)(b) of 2013 Rules.

The representations

14. The applicant's representations were set out in an undated document attached to an email of 30 June 2017. He apologised to the Tribunal and Judge Vance and stated that he wished to pursue both applications against 13-14DTL and WEMPL. He pointed out that the latter was the managing agent for the period of the service charge dispute, when it had full operational control over the Building and the service charge fund. He also referred to Bradys' previous, unsuccessful request to strike out the case against WEMPL.
15. The applicant's representations included a revised list of service charge issues to be determined by the Tribunal, if the applications are not struck out. Some of these were new issues, not raised in the First or Second Applications. The applicant stated that he did not intend to demand and/or issue proceedings against 13-14DTL following the Tribunal determination (to recover any sums disallowed). Rather the determination "*...should clearly serve as an important criticism of the Second Respondent given the control and secrecy they have exerted over the First Respondent, and consequently I would anticipate presenting the findings to the other shareholders of the First Respondent and encourage it to demand such amounts to be recovered from Second Respondent or threaten action.*"
16. 13-14DTL's representations were contained in a letter from two of its directors, Marianna De Brito Ribeiro Santos and Betty Harris, dated 14 July 2017. They did not press for the applications to be struck out. To the contrary, they now support the applicant and would like the Tribunal to determine the service charges with a view to pursuing the WEMPL for any sums disallowed.
17. Bradys filed detailed representations on behalf of WEMPL, dated 14 July 2017. Not surprisingly, they contend the applications should be struck out. The service charges are payable to 13-14DTL under the terms of the applicant's lease. If charges are disallowed then any credits would be payable by 13-14DTL, rather than their client. There is no privity of contract, as their client is not a party to the lease and should not be a party to the proceedings.
18. Bradys pointed out that their client had managed the Building as agent for 13-14DTL. The agency had ceased on 31 March 2017 and WEMPL cannot make further representations on behalf of 13-14DTL.
19. WEMPL consented to being added as a respondent to the First Application, as its managing director was named in that application, it was managing the Building at the time and allegations of fraud had been made. However, the circumstances have changed as the management has ended and the allegations have been rebutted.

20. Bradys objected to the applicant's revised list of service charge issues, pointing out that many were new issues and some do not fall within the Tribunal's jurisdiction. Further the applicant does not have a cause of action against WEPML for the new issues, which are matters between the first and second respondents. These should be decided by the County Court, rather than the Tribunal. Allowing the applicant to pursue the new issues before the Tribunal would be contrary to the overriding objective at Rule 3 of the 2013 Rules.

The Tribunal's decision

21. The First and Second Applications are struck out pursuant to Rule 9(3)(b) of the 2013 Rules.

Reasons for the tribunal's decision

22. The applicant has adopted a scatter gun approach to this case, with no regard to the Tribunal's jurisdiction and is clearly motivated by his distrust of WEPML. In the First Application he sought an enquiry "*into the business practices of Warwick Estates management*" and made very serious allegations of fraud, greed, lies and deception. Dr Villaverde, Dr Dempster and Dr Stevens were incorrectly named as the respondents. The correct respondent should have been 13/14DTL, being the freeholder and the party entitled to receive service charges under the lease.
23. The applicant subsequently raised a number of issues that were outside the scope of the First Application. He issued the Second Application to try and extend the scope of the case. However, this was issued shortly before the First Application was due to be heard, resulting (at least in part) in the adjournment of that hearing. The Second Application also incorrectly named Dr Villaverde, Dr Dempster and Dr Stevens as respondents and this has not been corrected.
24. On 23 May 2017 the applicant stated that his claim was now solely against WEPML whereas he now wishes to pursue both applications against 13-14DTL and WEPML
25. The purpose of the CMC on 30 May 2017, as identified at paragraph 3 of the directions dated 23 March, was to join the two applications and issue appropriate directions. The applicant failed to attend and has given no proper explanation for his non-attendance. Had he attended, the Tribunal could have narrowed the issues to matters within its jurisdiction, identified the correct respondents and given clear directions for the determination of the case.
26. Paragraph 1(b) of the 30 May 2017 directions required the applicant to explain why the Tribunal had jurisdiction to determine the issues

regarding the conduct of WEPML and why these are relevant to his liability to pay service charges. His representations failed to address these points. Rather he made a number of further criticisms of WEPML and raised new issues.

27. Rule 3(4) of the 2013 Rules requires the parties to help the Tribunal to further the overriding objective and to cooperate with the Tribunal generally. The applicant failed to cooperate by not attending the 30 May CMC and not addressing paragraph 1(b) of the directions, which has prevented the Tribunal from getting the case on track. It is impossible to deal with this case fairly or justly, as the issues raised by the applicant are a moveable feast and lack any focus. His most recent list raises many new issues, some of which are outside the Tribunal's jurisdiction. For example, he seeks a determination that WEPML pays service charge funds to 13-14DTL. This is a matter between these two companies and should be decided by the County Court.
28. The First Application against WEPML should be struck out due to the applicant's failure to co-operate with the Tribunal, including his failure to restrict the issues to matters within the Tribunal's jurisdiction. Furthermore, both applications should have been pursued solely against 13-14DTL being the party entitled to payment of the service charges (and liable to repay any sums disallowed). Panel 4 on the application form spells out that the respondent will only be the managing agent "*..if they are a party to the lease*". WEPML is not a party to the applicant's lease.
29. The Tribunal then considered whether the applicant could proceed with the First Application against 13-14DTL. It is clear from his latest representations that his motive is to secure adverse findings against the WEPML, to support a claim by 13-14DTL. He does not intend to pursue the latter, if service charges are disallowed. This means that continuing solely against 13-14DTL serves no purpose. Furthermore, the Tribunal's role on a section 27A of application is to determine the payability of service charges. It is not part of its role to investigate or regulate the conduct of managing agents or to make findings to support potential County Court proceedings.
30. Finally the Tribunal considered whether the applicant could proceed with the Second Application. Neither 13-14DTL nor WEPML are parties to that application, which is pursued solely against Dr Villaverde, Dr Dempster and Dr Stevens. The Second Application should clearly be struck out, as these three directors are not a party to the lease and are not entitled to payment of service charges.
31. Accordingly both applications are struck out with immediate effect.

Name: Tribunal Judge Donegan **Date:** 28 July 2017

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

- (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, improvements 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 or later period.

Section 27A

- (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.
- (4) No application under subsection (1) or (3) 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.

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Rule 3

Overriding objective and parties' obligations to co-operate with the Tribunal

- (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
- (2) Dealing with a case fairly and justly includes –
 - (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;
 - (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
 - (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
 - (d) using any special expertise of the Tribunal effectively; and
 - (e) avoiding delay, so far as compatible with proper consideration of the issues.
- (3) The Tribunal must seek to give effect to the overriding objective when it –
 - (a) exercises any power under these Rules; or
 - (b) interprets any rule or practice direction.
- (4) Parties must –
 - (a) help the Tribunal to further the overriding objective; and
 - (b) co-operate with the Tribunal generally.

Rule 9

Striking out a party's case

- (1) The proceedings or case, or the appropriate part of them, will automatically be struck out if the applicant has failed to comply with a direction that stated that failure by the applicant to comply with the direction by a stated date would lead to the striking out of the proceedings or that part of them.
- (2) The Tribunal must strike out the whole or a part of the proceedings or case if the Tribunal –
 - (a) does not have jurisdiction in relation to the proceedings or case or that part of them; and
 - (b) does not exercise any power under rule 6(3)(n)(i) (transfer to another court or tribunal) in relation to the proceedings or case or that part of them.
- (3) The Tribunal must strike out the whole or part of the proceedings or case if -
 - a) the applicant has failed to comply with a direction which stated that failure by the applicant to comply with the direction could lead to the striking out of the proceedings or case or that part of it;
 - (b) the applicant has failed to co-operate with the Tribunal such that the Tribunal cannot deal with the proceedings fairly and justly;
 - (c) the proceedings or case are between the same parties and arise out of facts which are similar or substantially the same as those contained in a proceedings or case which has been decided by the Tribunal;
 - (d) the Tribunal considers the proceedings or case (or part of them), or the manner in which they are being conducted, to be frivolous or vexatious or otherwise an abuse of the process of the Tribunal; or
 - (e) the Tribunal considers there is no reasonable prospect of the applicant's proceedings or case, or part of it, succeeding
- (4) The Tribunal may not strike out the whole or a part of the proceedings or case under paragraph (2) or paragraph 3(b) to (e) without first giving the parties an opportunity to make representations in relation to the proposed striking out.
- (5) If the proceedings or case, or part of them, have been struck out under paragraph (1) or (3)(a), the applicant may apply for the proceedings or case, or part of it, to be reinstated.
- (6) An application under paragraph (5) must be made in writing and received by the Tribunal within 28 days after the date on which the Tribunal sent notification of the striking out to that party.

- (7) This rule applies to a respondent as it applies to an applicant except that –
- (a) a reference to the striking out of the proceedings or case or part of them is to be read as a reference to the barring of the respondent from taking further part in the proceedings or part of them; and
 - (b) a reference to an application for the reinstatement of proceedings or case or part of them which have been struck out is to be read as a reference to an application for the lifting of the bar on the respondent from taking further part in the proceedings; or part of them.
- (8) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Tribunal need not consider any response or other submission made by that respondent, and may summarily determine any or all issues against that respondent.