

12354



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

Case Reference : **MAN/00BR/LSC/2017/0005**

Property : **Flat 10, Fairhope Court, 1-3, Fairhope Avenue, Salford M6 8AZ**

Applicant : **Dr Jayashree Yadav**

Respondent : **Tuscola (FC01) Limited
Represented by SLC Solicitors and Mr
Worthington of counsel**

Type of Application : **Landlord and Tenant Act 1985, Section 27A
and Section 20C**

Tribunal Members : **Mr J R Rimmer
Mr J Faulkner**

Date of Decision : **7th August 2017**

DECISION

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Order

- (1) The service charges in respect of Flat 10, Fairhope Court, 1-3 Fairhope Avenue, Salford, M6 8AZ for the year to 31st December 2016 and budgeted for the year to 31st December 2017 are reasonably incurred at reasonable cost.**
- (2) The application under Section 20C is refused.**
- (3) The tribunal makes no order for costs in favour of the Respondent.**

Application and background

1. The Applicant is the current owner of Flat 10, Fairhope Court, Fairhope Avenue, Salford. The Respondent company is the current freehold owner of the building and grounds and it currently employs Regent Property Management Limited to manage the building and to provide the appropriate services required under the leases of the flats within the development of which Flat 10 is a part. A copy of the lease for the flat has been provided to the Tribunal. Its principal terms are that was granted on 7th February 2008 at a premium and a rent of £150.00 a year for 125 years from 14th March 2007, with a provision for the review of the rent at 10 yearly intervals.
- 2 The Applicant seeks to establish the reasonableness and payability of the service charges for the flats for the years 2016 and 2017. The service charge year runs from 1st January to 31st December in each calendar year.
- 3 There is also an application made under section 20C Landlord and Tenant Act 1985 that any costs incurred by the Respondent before the Tribunal should not form any part of any future service charges levied in respect of the property. This is considered further, below.
- 4 The lease contains provisions relating to the service charges at several points:
 - Clause 2 contains a covenant by the tenant to observe the obligations contained in Schedule 8 to the lease.
 - Schedule 8 contains the obligation to pay by way of additional rent the Lessee's Proportion (defined in Schedule 7) of the maintenance expenses referred to in Schedule 6
 - Those expenses are the general maintenance and service obligations that the lessor has covenanted to perform and for which a service charge is levied.

- Those obligations are what might be generally regarded as the usual obligations, including insurance, undertaken for the proper management and upkeep of the development. They appear to contain nothing unusual or onerous that sets them apart from those forming part of any such obligation.
 - They are usefully set out at somewhat greater length in the resume of lease provisions provided by the Respondent at item 11 of the bundle of documents that the respondent provided.
- 5 The Application submitted to the Tribunal and dated 17th January 2017 sets out very generally the Applicant's concerns that the service charges are increasing year on year and the latest increase is one that is extremely large, taking into account as it does the likely cost of major works to the development that the Respondent considers necessary to protect the integrity of the building in which Flat 10 is situated and the grounds thereto. The Application does not take the matter any further than the general reference to the large cost of the service charge. It should be noted that the development contains 2 buildings, Flat 10 being situated in the older, and larger one, rather than the newer annexe.
- 6 In the absence of 5 years in question the Respondent outlines simply the cost of the major works proposed and provides documentary evidence of the relevant general costs, the surveyors report as to the likely costs of the major works, and the consultation process undertaken in respect of them.
- 7 If a more particularised complaint was ascertainable on the part of the Applicant it would appear to be that the consultation process undertaken by the Respondent, although complying with section 20 Landlord and Tenant Act 1985, was sterile in its nature and provided little for the tenants by way of mutual discussion of the issues arising in respect of the work to be undertaken until a very recent meeting in June 2017, some time after the application to the Tribunal was made.

Inspection

- 8 On the morning of 18th July 2017 the Tribunal inspected Fairhope Court and found that it comprised two detached brick built structures set in their own grounds in a largely residential area of Salford, a short distance from Salford Royal Hospital

- 9 Flat 10 is situated in the larger, older, building which is probably Victorian in age and certainly in character. Ideally, some updating works are required to maintain the integrity of the structure of the building which contains flats on three levels with access to the ground floor being the rear of the property the first floor being nearer ground level at the front and the ground floor being a basement. The interior common parts of the building are limited, being the hall, stairs and small landings giving access to the flats. Separate emergency lighting and fire detection equipment is installed. Externally there is a large open area providing parking and further open space for communal use. Access to the roadway is through a gateway to the pavement and let down kerbing. Although nominally gated it is understood that the gates are open and neither directly monitored nor operated.
- 10 A separate building contains a further number of flats which share certain elements of the service charge of a communal nature but as this has been a more recent addition to the site it is far less dated extended and in need of structural attention than the older building

The Law

- 11 The law relating to jurisdiction in relation to service charges falling within Section 18 Landlord and Tenant Act 1985 is found in Section 19 of the Act which provides:
- (1) relevant costs shall be taken into account in determining the amount of a service charge payable for a period-
 - (2) (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
- 12 11 Further section 27A landlord and Tenant Act 1985 provides:
- (1) An application may be made to a leasehold valuation 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

and the application may cover the costs incurred providing the services etc and may be made irrespective of whether or not the Applicant has yet made any full or partial payment for those services (subsections 2 and 3)

- 13 Subsection 4 provides for certain situations in which an application may not be made but none of them apply to the situation in this case.

Hearing

- 14 A hearing was scheduled to take place at the tribunal offices in Piccadilly Gardens, Manchester, following the inspection and this was attended by the Applicant, assisted by Mr G Vincent from flat 13, together with a number of representatives for and on behalf of the Respondent, chiefly Mr Alexander Rowell, of the managing agents, who had provided a witness statement in the bundle of documents submitted previously, and Mr Worthington of Counsel.
- 15 The hearing dealt with a number of simple issues that crystallised during the course of case and which may be set out shortly:
- The Applicant's concern over general levels of increase in the service charge in recent years, with particular reference to the costs of gardening and repairs
 - The perceived lack of any "community" involvement in the consideration of the major works, over and above the statutory consultation process, until the recent meeting called by the managing agents for leaseholders, tenants and adjoining occupiers.
 - An acceptance that as a matter of principle major works were required, but that the respondent had chosen to impose high short-term costs rather than spread costs over a longer period to assist affordability.
 - Particular concerns over the size of management fees and the insurance premium for the buildings on the development.
16. The respondent sought to deal with the matters raised in two ways:
- Justifying the reasonableness of the charges that were levied and
 - Relying on the fact that the Applicant had suggested no reasonable alternatives to the charges raised, or sought to adduce evidence of any unreasonableness in the charges by reference to alternative costings.
17. It was the clear view of the respondent that in relation to the year on year service charges there had indeed been significant increases but they arose from such matters as backlogged repairs, open tendering for contracts (gardening), a previous undervaluation for insurance purposes and the need to provide effective management to deal with the state of the buildings and the need for major works.

18. In relation to those works Mr Rowell gave a clear explanation of the works required, as calculated by a reputable surveyor, who had himself provided a competitive tender for his work and who had set out a clear programme of works, classified according to the priority with which they should be carried out. The consultation process had been thorough and a meeting of all interested parties, including adjoining owners affected by defects in the party wall, called at what he considered the most suitable moment after a sufficiently clear plan was available.
19. The Tribunal has some sympathy for the position of the Applicant, faced as he is with the prospect of very significant costs over the next two years, in addition to increasing regular service charges and it may well be that this could have been made less concerning if the respondent and/or its agent had provided an earlier opportunity for general discussion of the major works. Equally it is not for the tribunal to second guess the managing agents with the benefit of hindsight to the extent of necessarily suggesting that actions taken were other than unreasonable, especially in the situation of an extensive consultation exercise having taken place.

Determination

20. It may well be unfortunate that in the way that he approached this matter the Applicant may have done himself a disservice by not providing any significant evidence to support a contention that some, or all, of the charges were unreasonable and he may in other circumstances been better equipped to argue his case.
21. The Respondent however marshalled and presented its information in relation to the service charges generally and the major works in particular in a sound manner and provided significant documentation within the bundle to support its case. In so far as the tribunal also exercises an inquisitorial function in examining the evidence before it and the charges incurred and to be incurred it could find nothing to suggest they were unreasonable. It may be that some matters might have been addressed differently but it is not for the tribunal to replace one reasonable course of action with one that it merely considers more reasonable. With this in mind the tribunal is drawn to the conclusion that the service charges for the year ending 31st December 2016 are reasonably incurred at reasonable cost and the proposed charges for the current year are similarly reasonable.

Section 20C and costs

22. The Section 20C application is mentioned above. Under section 20C the Tribunal may, if it considers it just to do so, limit the Respondent's right to recover its professional and other costs incurred in conducting these proceedings in the service charge for future years, notwithstanding an entitlement in the lease to do so.
- 23 Mr Worthington also made an application to the Tribunal that the Respondent's costs for all of these proceedings before the Tribunal should be met by the Applicants in any event. It was his clear view, and that of those instructing him that the conduct of the Applicants was such as to fall within Rule 13(1)(b) of the First-tier (Property Chamber) Rules 2013 in that they had behaved unreasonably in bringing and conducting the proceedings. The Applicant was of the view that no such order should be made. It was probably his case in a nutshell that he had been naïve, but not unreasonable.
- 24 Proceedings before the Tribunal have generally been regarded as being part of a no cost jurisdiction and it was only in very limited circumstances and to a limited amount that a party could be required to meet the costs of the other side.
- 25 Rule 13 of the procedure rules changed that position and provides that an order may be made :
- 13...
- (b) if a person has acted unreasonably in bringing, defending, or conducting proceedings in –
- (iii) a leasehold case.
- 26 The circumstances in which such an order should be made were considered extensively by the Upper Tribunal in Willow Court Management Company (1985) Ltd v Alexander & others (LRX90/2015) and in paragraphs 24 onwards in its decision the Upper Tribunal sets out its view as to what amounts to unreasonable behaviour, leading to wasted costs.
27. In paragraph 24, it is noted that (referring to the observations in Ridehalgh v Horsefield [1994 Ch 203] the leading authority on penalising unreasonable conduct in costs)
- ".. An assessment of whether behaviour is unreasonable requires a value judgement on which views might differ but the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level...Unreasonable conduct includes conduct which is vexatious and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads to an unsuccessful outcome...Would a reasonable

person in the position of the party have conducted themselves in the manner complained of?...Is there a reasonable explanation of the conduct complained of?

28 This raises a number of questions for the Tribunal, set out below, which may be used, and in the Tribunal's view, in any combination, to judge the Applicant's behaviour in this case

(a) Is the Applicant's behaviour unreasonable in the context of behaviour that includes "conduct which is vexatious and designed to harass the other side"?

No: the words used by Sir Thomas Bingham MR would appear to contemplate behaviour the nature of which is considerably more reprehensible than that seen in this case.

(b) If the actions are those of the Applicant alone rather than of representatives, with professional skills and experience, does that result in actions being more excuseable?

Yes: The Tribunal is of the view that when judging the alleged conduct against the standards of behaviour of an (intelligent – the Applicant is a doctor) layman's standards the behaviour is not of such a nature for the Tribunal to consider it as unreasonable..

(c) Would a reasonable person in the position of the Applicant have conducted themselves in the manner complained of?

Conceivably: The Tribunal is not prepared to take a step so far as to conclude that every reasonable party would have acted differently to the Applicant and in a manner that would have been preferred (hoped for?) by the Respondents. If there is a Rubicon that reasonableness crosses into unreasonableness this Tribunal does not consider that crossing to have occurred here.

(d) Is there a reasonable explanation of the conduct complained of?

Yes: A leaseholder faced with the situation which faced the Applicant may well have sought to effect some sort of enquiry into the costs being incurred and the Tribunal provides an adequate means by which to do so. It is a tribunal and not a court and a forum for enquiry as well as confrontation. Without doubt the Applicant could have made his case better and it is not beyond reason to suggest that in different circumstances, without the well marshalled case of the Respondent some charges may have invited more rigorous investigation.

(e) As a final observation, The Tribunal notes the observations in the Willow Court case in favour of effective case management in narrowing the issues between the parties. The efficacy of this may not always be apparent, particularly as a hearing approaches in any event, it is always open to parties to make an application for further review if they wish. And it would have been open to the respondent to address the lack of information from the applicant earlier.

29. For the reasons set out above the tribunal is not minded to make an order for costs against the Applicant.
30. the Tribunal is not however minded to make an order under Section 20C Landlord and Tenant Act 1985. It is clear from paragraph 26 of schedule 6 to the lease that the costs of tribunal proceedings are recoverable as service costs and the Tribunal does not believe it to be just that the Respondent should be unable to recover these in future years. It did not ask to be party to proceedings, did not bring them upon itself and has had the reasonableness of its actions upheld.

