



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

Case Reference : LON/00AG/LSC/2015/0074

Property : 38 Lambs Conduit Street, London
WC1N 3LD

Applicant : Patrick and Tamara Cannon

Representative : Mr Cannon in person

Respondent : 38 Lambs Conduit LLP

Representative : Memery Crystal

Type of Application : For the determination of the
reasonableness of and the liability
to pay a service charge

Tribunal Members : Mrs S O'Sullivan
Mr C Gowman
Mrs L West

**Date and venue of
Hearing** : 16 June 2015 at 10 Alfred Place,
London WC1E 7LR

Date of Decision : 25 September 2015

DECISION

Decisions of the tribunal

- (1) The tribunal determines that the sum of £480 is payable by the Applicants in respect of costs of the Shapiro report;
- (2) The tribunal finds that the £16,000 legal fees are recoverable as a service charge but not as an administration charge;
- (3) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985; and
- (4) The tribunal makes no order under Rule 13(2) of the Tribunal Procedure (First tier Tribunal) (Property Chamber) Rules 2013 (the "Property Chamber Rules 2013").

The application

1. The Applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of service charges and administration charges payable by the Applicants in respect of the service charge years 2013-14 and estimated charges for 2014-15.
2. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

3. The Applicants were represented by Mr Cannon appearing in person. Mr Cannon is a barrister but was appearing as a litigant in person. This jurisdiction is not his speciality. The Respondent was represented by Mr Lees of Counsel. Also attending for the Respondent were Mrs Seal and Mr Ebel, both solicitors in the employ of Memery Crystel.

The background

4. The property is described in the application as a mixed commercial and residential use building with a menswear shop occupying the ground floor and basement trading as "J Crew" and a maisonette above the shop on the first, second and third floors. The Applicants are the long leaseholders of the maisonette known as 38 Lamb's Conduit Street, London, WC2A 3UE (the "Flat").
5. The landlord acquired the property in May 2013. The service charges were divided originally as 40% to the commercial premises and 60%

payable by the Flat. In December 2013 the landlord obtained a report from a Mr Hoffman and a second report from Mr Shapiro on 22 January 2013 in relation to how the service charges should be apportioned. Mr Cannon disputed the apportionment of the service charges based on these reports.

6. There has been a long dispute between the parties in relation to the service charges. The Respondent had originally invoiced the Applicants a total of £8,563.47 for the years 2013 and 2014. A credit note was issued dated 18 March 2015 in the sum of £7,645.97 and on the same date a revised invoice issued in the sum of £2,696.52. This represented a net reduction of charges of £4,949.45. This reduction was due to the Respondent reducing the management charge charged to the Applicants from £2,500 to £250 per annum following the advice obtained from Mr Shapiro contained in his report (see below). The Applicants continued to dispute the service charges due as a result of the revised apportionment.
7. The charges include ground rent which does not fall within the tribunal's jurisdiction. In any event it appears that this matter has been agreed between the parties.

The issues

8. Various issues had now been the subject of agreement as follows;
 - (i) The parties had agreed that the management charge at £250 for the service charge years in issue;
 - (ii) The parties had also agreed that the current use of the commercial premises (i.e. retail) did not disproportionately increase the insurance premiums and that division by floor area is appropriate;
 - (iii) It was agreed in principle that the apportionment of the service charge should be calculated by reference to floor area. The amount now payable by the Applicants in respect of service charge was agreed at £2,493.32 representing service charges due for the period 17.5.13 to 23.6.15;
 - (iv) Floor space and final apportionment ratio was agreed at 63.9% for the Flat and 36.1% for the commercial element; and
 - (v) Insurance apportionment was likewise agreed in principle at 63.9% as above;
9. The issues remaining in contention were confirmed as follows;
 - i. Whether the half fee for the Shapiro report was reasonable;
 - ii. Whether the £16,000 legal fees incurred in this dispute by the Respondent were reasonable;
 - iii. Whether to make an order under section 20C; and

- iv. Whether to award the Respondent its costs pursuant to Rule 13.
10. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.
11. The tribunal was provided with a bundle and a Scott Schedule and both parties had lodged skeleton arguments together with authorities relied upon. At the commencement of the hearing Mr Cannon produced a bundle of additional documents he wished to rely on. A short adjournment took place to enable Mr Lees to read through the bundle after which he confirmed that he had no objection to their being produced.
12. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

The Shapiro report

13. The Applicants have been asked to pay the sum of £480 which represents half the cost of the Shapiro report. The Applicants dispute this sum. The Applicants accept in principle that the landlord is entitled to appoint a surveyor pursuant to the provisions of the lease. They also accept that the Shapiro report was useful in allowing the parties to reach agreement on many items in dispute. However they say that the Respondent had already obtained a surveyor's opinion dated 6 December 2013 under clause 4.31 of the lease and that the lease does not provide the landlord with a second bite of the cherry to obtain another report. The Applicants also say that the Hoffman report was relied on as an expert opinion. It is clear that the Applicants raised this objection very early on when the landlord indicated its intention to obtain a further surveyor's report and made it clear that they would expect the costs to be borne by the landlord alone.
14. The Respondent explained that an initial informal report was obtained at the Respondent's request in relation to the apportionment of the service charge from Mr Hoffman. This comprised a short email included at page 235 of the bundle. This confirmed that the apportionment of the service charge in accordance with the floor area was perfectly reasonable and in accordance with the RICS Code. The Respondent says that this was an informal opinion and that prior to the engagement of Mr Shapiro no other surveyor had been nominated or engaged by the landlord. The issue of apportionment continued to be a source of disagreement and thus the landlord using its powers under the lease appointed Mr Shapiro to act as surveyor under the lease and to advise on the apportionment. In this regard the landlord relies on the powers set out in clauses 1.1 and 4.31 of the lease.

15. Mr Shapiro concluded that it was reasonable to apportion the service charge by floor area. He calculated the service charge to be apportioned to the Flat at 70.5% which the landlord proposed to adopt. It was subsequently agreed between the parties that the proportion payable by the Flat is 63.9%. Mr Shapiro also advised on a reasonable management fee as well as advising that it was reasonable to calculate insurance by reference to floor area.
16. The Respondent submitted that the Shapiro report was permitted under the terms of the lease, correctly analysed the apportionment of the service charges and insurance, was accepted by both parties subsequently and significantly reduced the issues in dispute before the tribunal. The Applicants have been asked to pay only 50% of the cost of the fee rather than the 63.9% as per the service charge apportionment.
17. Counsel for the Respondent also submitted that there has been no duplication of cost as the Applicants were never asked to contribute towards the cost of the initial report and that the cost of the Shapiro report itself was reasonable and within industry norms. As far as the Applicants' argument that this was a second bite at the cherry was concerned, Counsel for the Respondent submitted that this was an argument that an implied term existed in the lease and that the test was whether such a term was necessary for business efficacy. The lease did not provide any frequency and Counsel submitted that the ability to appoint a surveyor could only be limited to one year. There was nothing in the lease to suggest that the surveyor appointed could not be changed to an alternative surveyor at a later date. In any event however Counsel stressed that there had not been two bites to the cherry as there had been no formal instruction given to Mr Hoffman and he had not been engaged for the purposes of liability.

The Shapiro report - the tribunal's decision

18. The tribunal finds that the costs of the Shapiro report were reasonably incurred in accordance with the provisions of the lease and that the Applicants are liable to pay the sum of £480 in respect of the cost of the Shapiro report.
19. The Applicants accept that the landlord is entitled to engage a surveyor in accordance with the terms of the lease and recover the cost of the same through the service charge. Further no issue is taken with the amount of that fee which the tribunal considers in any extent falls within a reasonable range.
20. We considered the report of Mr Hoffman and the surrounding circumstances and did not consider that this was a formal report. The advice sought appeared to us to have been sought on an informal basis for which no payment was expected or received, the "report" was simply a short email giving a brief opinion. The appointment of Mr Shapiro

conversely was a formal appointment in respect of which a fee was agreed and an invoice rendered. We therefore considered that the fees of Mr Shapiro were recoverable and in the circumstances of an ongoing dispute were reasonably incurred.

21. In any event we did not consider that the lease included any restriction on the number of occasions in which a surveyor would be retained.
22. Accordingly we allowed the cost of the Shapiro report in full. We note that the Respondent has invoiced the Applicants for 50% of the fees rather than the agreed apportionment of 63.9%.

Legal fees in the sum of £16,000

23. The Applicants disputed the sum of £16,000 claimed as legal fees.
24. The Respondent's preliminary response in the Scott Schedule was that the issue of the legal fees did not fall within the tribunal's jurisdiction as they did not form part of the service charge years before the tribunal and they had not been demanded from the Applicants. Further it was said that the costs may be demanded as an administration charge. The Scott Schedule did however attach a copy of a demand dated 21 May 2015 for the legal costs in the sum of £16,000 issued by Wellbeck Asset Management acting for the Respondent which attached a summary of tenant's rights and obligations in relation to administration charges.
25. Counsel confirmed at the commencement of the hearing that the Respondent was willing to consent to an application by the Applicants to amend the application so that the legal fees could be considered. The application was duly amended by the tribunal to include the legal fees.
26. The Respondent has claimed the sum of £16,000 in respect of its legal fees in dealing with this long running dispute.
27. The Respondent relies on clauses 4.18/4.22 and/or 4.22.3 and/or clauses 1 and 4 of the Sixth Schedule of the lease. In particular it is said that the indemnity provisions of clause 4.18 apply to the case (*Christoforou v Standard Apartments Ltd 2014 L & TR 12*). In Counsel's skeleton argument it is stated that the costs are claimed by the Respondent as administration charges. However in submissions at the hearing it was confirmed that they were claimed alternatively as legal costs recoverable through the service charge.
28. The Respondent says that the legal costs are recoverable under the terms of the lease as a variable administration charge and accordingly the tribunal has jurisdiction to consider them. The Respondent says that the test is whether the amount of the charges is reasonable not whether they were reasonably incurred. However in any event it is said

that the costs would be reasonably incurred in defending the proceedings. In particular the landlord relies on the fact that the Applicants have taken a number of bad points and that the only point in fact in contention at the hearing was the Shapiro fee.

29. Counsel for the Respondent further submitted that the amount charged was reasonable and that all evidence supported this. In particular it is said that the dispute commenced in August 2013 and was therefore almost 2 years in length and that the Applicants have consistently taken bad points. The Respondent says that it is not in issue whether the statutory requirements of Schedule 11 to the 2002 Act have been complied with as they do not form part of the Applicants' case.
30. In response the Applicants say that the demands for service charges in respect of the legal costs were not compliant with section 47 of the Landlord and Tenant Act 1987 Act (the "1987 Act") as they did not contain the address of the landlord but only that of the managing agent (relying on *Beitov Properties Limited v Elliston Bentley Martin [2012] UKUT 1333 (LC)*).The fact that the demands did not contain the landlord's address in breach of section 47 was conceded by Counsel for the Respondent. Thus it was the Applicants' case that as valid service charge demands had never been served the Applicants could not be said to ever have been in breach of the lease. Thus the Respondent could not rely on the lease provisions identified to claim the costs as administration charges as these were based on a breach of covenant.
31. As far as the alternative claim for the legal costs through the service charge are concerned the Applicants challenged the recoverability of those costs under the lease by simply submitting there was no provision for the recovery of legal costs.

The tribunal's decision

32. As at the date of the hearing there had been no valid demand for either service charges or the legal costs by way of an administration charge. We find therefore that the legal costs cannot be recovered by way of administration charge. This is because as the landlord has never served valid service charge demands containing all the prescribed information required by section 47 the tenants cannot be said to have been in breach of the lease at the time the relevant costs were incurred. All of the provisions relied upon in claiming the costs as an administration charge are predicated upon there having been a breach of covenant by the tenant. If we are wrong in this regard our comments in relation to the reasonableness of the costs below apply equally to the reasonableness of the costs if they are a valid administration charge.
33. We note that by letter dated 23 June 2015 which was subsequently provided to the tribunal the landlord re-submitted all invoices which now appear to be compliant with section 47. However we do not

consider that this renders the costs now payable as an administration charge given that the Applicants cannot be said to have been in breach of covenant when the relevant costs were incurred.

34. However we consider that in principle on construction of the lease the legal costs are capable of being recovered as costs of management as a service charge rather than as an administration charge pursuant to paragraphs 1 and 4 of the Sixth Schedule to the lease either as a reasonable cost incurred by the landlord in complying with its covenants under clause 5 of the lease or as a cost of management. In this regard we had particular attention to the decision of the Court of Appeal in *Iperion Investments Corporation v Broadwalk House residents Ltd* 1995 2 EGLR 47. As a result in principle 63.9 % may be charged to the Applicants subject to the reasonableness of the costs in issue.
35. As far as reasonableness of those costs was concerned Mr Cannon confirmed that the Applicants did not take any great issue on their quantum. This was subject to the caveat that he did not consider costs January to July 2014 should be recoverable in relation to time spent agreeing the points of dispute for reference to Mr Shapiro. Counsel for the Respondent submitted that the Respondent did not accept Mr Cannon's draft statement of issues as it was not concise. The tribunal looked at the correspondence between the parties and considered that there had been delay on the part of both parties in agreeing the schedule and did not consider that any of those costs were unreasonable. As a result of Mr Cannon's concession the tribunal were not able to consider the reasonableness of the legal costs over the entire two year period.
36. We therefore allowed the legal costs as service charges with the effect that 63.9% may be charged to the Applicants.

Application under s.20C

37. The Applicants applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above and the history of this long running dispute, the tribunal declines to make any order under section 20C of the 1985 Act.

Application pursuant to Rule 13

38. The tribunal also heard an application under Rule 13(2) of the Property Chamber Rules 2013 from the Respondent. It is said that the Applicants have clearly acted unreasonably and/or vexatiously in bringing and conducting the proceedings. In particular it is said that the Applicants brought the proceedings unreasonably where the Respondent was

taking active steps to obtain the Shapiro report and thereby resolve the dispute as to service charges and insurance. It was submitted that in substance the Applicants have already lost the application as they have conceded all of the main points raised in the application. Further the net result of the application was that the Applicants are paying an increased proportion of the service charge. By contrast it was said that the Respondent has acted reasonably at all times including commissioning and acting upon the Shapiro report.

39. The Applicants likewise made an application for their costs under Rule 13 on the basis that the Respondent had acted unreasonably in the conduct of the proceedings.
40. The power to award costs is discretionary and the wording of the provision makes it clear that the tribunal may only make such an order if a person's conduct of the proceedings is unreasonable rather than his behaviour generally. An order should therefore only be made where a party has clearly acted unreasonably in bringing, defending or conducting the proceedings. This is because the tribunal is essentially a no costs jurisdiction. The award of costs therefore should in our view only be made where on an objective assessment a party has behaved so unreasonably that it is fair that the other party is compensated to some extent by having some or all of its costs paid. Having considered the facts of the case overall we do not consider it appropriate to make an order under Rule 13. The parties were still in dispute on a number of matters when the proceedings were issued and indeed the landlord had been slow to resolve some of the issues which have since been resolved in the Applicants' favour, such as the management fee. Further we do not consider that the conduct of the proceedings by the Applicants has been unreasonable. No order is therefore made.

Name: Sonya O'Sullivan

Date: 25 September 2015

Appendix of relevant legislation

Landlord and Tenant Act 1985

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 19

- (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 provisions 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 27A

- (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.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to a leasehold valuation 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.

Section 20C

- (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, residential property tribunal or the Upper 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;
 - (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
 - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

- (c) in the case of proceedings before the Upper 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.

Leasehold Valuation Tribunals (Fees)(England) Regulations 2003

Regulation 9

- (1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.
- (2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

- (1) In this Part of this Schedule “administration charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
 - (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
 - (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
 - (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
 - (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.
- (2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

- (3) In this Part of this Schedule “variable administration charge” means an administration charge payable by a tenant which is neither—
 - (a) specified in his lease, nor
 - (b) calculated in accordance with a formula specified in his lease.
- (4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

- (1) An application may be made to a leasehold valuation tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.
- (3) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
- (4) No application under sub-paragraph (1) 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.
- (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
 - (a) in a particular manner, or

(b) on particular evidence,
of any question which may be the subject matter of an application
under sub-paragraph (1).

Schedule 12, paragraph 10

- (1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).
- (2) The circumstances are where—
 - (a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
 - (b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.
- (3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—
 - (a) £500, or
 - (b) such other amount as may be specified in procedure regulations.
- (4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.