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## RESIDENTIAL PROPERTY TRIBUNAL SERVICE

### LEASEHOLD VALUATION TRIBUNAL

**Case number:** BIR/OOFY/LLC/2010/0004

**Property:** Riverbank House, Victoria Embankment, Nottingham NG2 2JY.

**Applicants:** Mr L Osborne (Appt 2), Mr and Mrs L Hughes (Appt 3), Mr M Burger (Flat 4), and Mr and Mrs A Nicholson (Appt 5).

**Respondents:** Pemberstone Reversions (4) Ltd.

**Represented by:** Miss A McLachlan of SLC Solicitors.

**Application:** Application for the limitation of service charge arising from the landlord's costs of proceedings in the Leasehold Valuation Tribunal (Section 20C Landlord and Tenant Act 1985) (the Act) in respect of case no: BIR/37UJ/LSC/2009/0051

**Tribunal:** Mr R Brown FRICS (Chairman)  
Mr C Goodall MBA LLB

### DECISION

1. No order is made under Section 20C Landlord and Tenant Act 1985 preventing the Respondents from recovering the costs of proceedings (in so far as the lease permits) by way of the service charge in respect of case No: BIR/37UJ/LSC/2009/0051 (Ms S Bassi v Pemberstone Reversions (4) Ltd).

### REASONS FOR DECISION

#### The Application

2. The Property is a residential building with five tenants each of whom has a long lease of a part of the Property.
3. In March 2010, the Leasehold Valuation Tribunal considered an application under s27A of the Landlord and Tenant Act 1985 by one of the tenants, Ms S Bassi, who claimed that the Respondent had charged service charges for management of the Property that were not reasonable (the Previous Proceedings).
4. The Leasehold Valuation Tribunal determined the Previous Proceedings in favour of the Respondent and refused to make an order under s20C preventing recovery of the costs of the Previous Proceedings from Ms Bassi,

in so far as the Respondent was entitled to recover some or all of the costs from her under her lease.

5. This Application is made by the remaining lessees (listed above) at Riverbank House following the Previous Proceedings.

#### **The Law**

6. The relevant law is set out in **Appendix 1** attached.

#### **The Lease**

7. The Tribunal were provided with a copy of the lease to Apartment 5 dated 28<sup>th</sup> November 2003. The Respondents say that all the leases for the Property are in identical form so far as the service charge obligations are concerned, which the Tribunal assumes to be correct.
8. Under para 3.7 of the leases, each tenant covenants to pay the Service Charge. This is defined in para 1.24 as being a percentage share of the Total Expenditure. This is (as per para 1.28) the expenditure reasonably incurred in providing the services set out in the Sixth Schedule to the Lease, including the costs of employing any managing agents. The percentage share differs from flat to flat and each percentage share is set out in each lease.
9. Paragraph 9 of the Sixth Schedule (which details the service to be provided) includes:

*'The payment of all proper fees charges expenses and commissions of the Landlord in connection with the management and supervision of the Estate (including but not by way of limitation the collection of rents and service charge, the maintenance of the estate and the production of service charge accounts)'.*

#### **The Property and the Tribunal's Inspection**

10. The Tribunal, having previously inspected the property, did not re-inspect for the purposes of this hearing.

#### **The Hearing**

11. A hearing was held on 28th September 2010 in the Tribunal's offices in Birmingham.
12. Directions were issued at the hearing allowing the Respondents, as they requested, time to consider the significance of the case of *Morgan v Stainer and Others* [1993] 2EGLR 73.

### **Applicant's Case**

13. The Applicant's were represented at the hearing by Mrs Osborne and Mr Hughes. Their case is founded on the following:
  - 13.1. The fact the Applicants were not named parties to the previous proceedings and were thus unable to comment or represent themselves at that hearing but they are now asked to pay part of the bill in those proceedings.
  - 13.2. A submission that under section 20C of the Act costs are payable by the tenant or the person(s) specified in the application. The Applicants were not specified as a party in that application and as result the order is wholly unfair and inequitable.
  - 13.3. Further they were not informed of the previous proceedings, nor were they invited to join those proceedings, and they did not know of the involvement of the Tribunal.
  - 13.4. The frivolous action of the Respondent in the previous proceedings had resulted in 4 innocent leaseholders sharing in the costs incurred.
  - 13.5. The order for costs made by the Tribunal is in contravention of Article 6 of the European Convention on Human Rights.
14. The Applicants further argued their position was supported by the case of *Morgan (above)* which, in further written submissions, they said was similar to the current proceedings. They said that in that case it was found that the Landlord could not recover his costs by way of service charge. In that case Mr David Neuberger giving judgement said '*legal and other costs.....have to be reasonably and properly incurred before they can be the subject matter of a claim under the service charge provisions.....sums claimed must.....with regard to their nature, be fair and reasonable*'. The Applicants submitted it is neither 'fair nor reasonable' for the Respondents to include costs as an item in the service charges to tenants not involved in those proceedings.

### **Respondents' Case**

15. The Respondents understanding was that no order had been made under section 20C and that this application was not a challenge as to the quantum of those costs.
16. As to the argument that Article 6 applies the Applicants had the right to bring this action so therefore there was no abuse of Article 6.
17. The Respondents believed that no 20C order had been made in the Previous Proceedings because the Tribunal had found substantially in favour of Respondents in those proceedings.

18. The Respondents are entitled to recover these costs under paragraph 9 of the Sixth Schedule to the lease.
19. With regard to *Morgan (above)* the Respondents in their further submission set out their interpretation of that case.

### **Tribunal's Deliberations**

20. The Tribunal considered both the written and oral the evidence of both parties.
21. The Tribunal explained to the parties that there had not been an order in the Previous Proceedings that the Applicants pay the costs incurred in those proceedings nor had it quantified the amount of those costs. That was a matter for a separate application. The basis upon which the Applicants were being asked to pay the costs was that the Respondent argued that the leases allowed it to claim those costs, not that the LVT had ordered the Applicants to pay.
22. The Tribunal has no jurisdiction under this s20C application to determine whether or not such costs were of a reasonable amount and recoverable under the lease.
23. Further the Tribunal has no jurisdiction to determine whether or not costs are recoverable from an individual lessee under any other part of the lease.
24. As regards the submissions of the Applicants the Tribunal concluded there has been no abuse of the European Convention on Human Rights because as the Applicants were not party to the Previous Proceedings they are not bound by them. The Applicants in this case have not been denied the right to make their own application under section 27A of the Act to challenge the service charges levied.
25. Similarly there is no bar to the Applicants making an application (under section 27A of the Act) for the determination of the reasonableness and payability of the costs claimed by the Respondents in the Previous Proceedings.
26. With regard to *Morgan (above)* the Tribunal notes that the Respondent merely offers an interpretation of that case with no explanation as to why it was/was not applicable to the current proceedings. The Tribunal is not convinced of its relevance to the current proceedings because it was based on an interpretation of a paragraph of the lease in that case which was different to the wording of paragraph 9 (above) to the Tribunal. It was also a case where, essentially, the landlord lost legal proceedings brought by tenants, and then tried to claim the costs of the proceedings (including costs it had been ordered to pay to the tenants) from the tenants via the service charge. That is of course very different from these proceedings, where the Respondent essentially succeeded in the Previous Proceedings.

27. The Tribunal's duty in this case is not to interpret the lease as to whether or not such sums are recoverable (the making of the order requested pre-supposes that such costs are recoverable).
28. The Tribunal's duty under an application under section 20C is to determine that if such costs are recoverable under the lease in question it is 'just and equitable' to either make no order or to make such order as it thinks 'just and equitable' in all the circumstances. The interpretation of the words 'just and equitable' in these circumstances do not simply relate to the apparent fairness or otherwise to an individual of such recovery but also to the contractual obligations of the parties. The Tribunal cannot simply say that because it appears unfair that a party will bear a cost that it is not contractually bound to do so. Thus the questions to be answered are:
- Is it just and equitable that the Applicants do not pay for something they have contracted to pay for?
  - Is it just and equitable that the landlord should be deprived of its right to recover costs that the lessees have contracted to pay for?
29. In arriving at its decision the Tribunal must ask itself whether or not the Respondent Landlord took some action which in the eyes of the Tribunal makes it just and equitable that they be deprived of their contractual right to recover the costs incurred in proceedings.
30. In this case the Respondents had in the Previous Proceedings successfully defended an action by one lessee against their administration of the service charge and management of the property. So the question the Tribunal must address is whether any of the Landlords actions had been unreasonable. All the leaseholders have signed a contract (the lease) under which such recovery appears to be allowed. No evidence of any unreasonable behaviour by the Landlord was submitted by the Applicants.
31. A covenant by a tenant in a lease is a property right upon which a Landlord is entitled to rely. The Tribunal concluded that on balance it was more just and equitable that the Landlord retains its property right than be denied it because of the apparent unfairness to a party(s) who had agreed to it when signing the lease.
32. The Tribunal therefore makes no order limiting the Landlord's right to recover the costs of proceedings under case no: BIR/37UJ/LSC/2009/0051 in so far as the lease entitles them to recover such costs as service charges.

  
Robert Brown FRICS  
Chairman

Dated..... 29 OCT 2010 .....

## **Appendix 1 – The relevant law**

### **Landlord and Tenant Act 1985**

#### **Section 20C**

##### **Limitation of service charges: costs of proceedings**

- (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 or leasehold valuation tribunal, or the Lands 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;
  - (b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;
  - (c) in the case of proceedings before the Lands 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.