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HM Courts & Tribunals Service

Residential Property TRIBUNAL SERVICE

SOUTHERN LEASEHOLD VALUATION TRIBUNAL

Case Reference: CHI/43UJ/LAC/2012/0017

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SCHEEDULE 11 OF THE COMMONHOLD & LEASEHOLD REFORM ACT 2002

Applicant:	Mrs A D Robinson
Respondent:	Mrs H A Barrett
Property:	Flat 14, Heather Ridge, Heatherside, Camberley, GU15 1AX
Date of Hearing	22 February 2013

Appearances

Applicant

Mr A Sheftel	Counsel
Ms C Gregorious	Solicitor from CAG Solicitors
Mrs A D Robinson	Landlord

Respondent

Ms F Redding	Solicitor, from The Head Partnership, Solicitors
Mrs H A Barrett	Lessee

Leasehold Valuation Tribunal

Mr I Mohabir LLB (Hons)
Mr D Lintott FRICS
Mrs J Playfair

Introduction

1. This is an application made by the Applicant under Schedule 11, paragraph 5 of the Commonhold and Leasehold Reform Act 2002 (as amended) ("the Act") for a determination of the Respondent's liability to pay and/or the reasonableness of a variable administration charge claimed by the her under the terms of the lease.

2. The administration charge in issue are the costs incurred by the Applicant in responding to an earlier application made by the Respondent under section 27A of the Landlord and Tenant Act 1985 (as amended) in relation to her contribution for insurance premiums for the years 2006/07 to 2012/13. The Tribunal's decision regarding that matter is dated 3 August 2012 ("the earlier decision").

3. In those proceedings, the Respondent had made an application under section 20C of the 1985 Act for an order that the Applicant be prevented from recovering any costs she had incurred through the service charge provisions in the lease.

4. At paragraph 33 of the earlier decision, the Tribunal concluded that the only provision in the Respondent's lease that might enable it to recover any of its costs from her were to be found in clause 4(14). It went on to find that the clause did not entitle the Applicant to recover any such costs as a service charge because it was not a provision which enables the (landlord) to recover any charge which "varies or may vary according to the (landlord's) relevant costs, as required by section 18(1) of the 1985 Act. Consequently, any demand for payment under clause 4(14) of the lease would not be a claim for a "service charge" and that section 20C was not engaged.

5. At paragraph 14 of the earlier decision, the tribunal went on to say that, in the event that on some future occasion the Applicant sought to recover the cost of those proceedings, the Tribunal would have to determine whether clause 4(14) of the lease permitted recovery and whether any such variable administration charge

was reasonable. This essentially set out the issues this Tribunal had to determine in this application.

6. By an application dated 23 November 2012, the Applicant made this application to the Tribunal in relation to her costs incurred in the earlier proceedings and these proceedings also, which are claimed as an administration charge. At the hearing, the quantum of the costs was agreed by the parties at £6,250 including VAT and disbursements, subject to the issue of liability.

The Law

7. The relevant law to be applied in this application is to be found in Part 1 of Schedule 11 of the Act. Paragraph 1(1) defines an administration charge as:

"1(1)... and amounts 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 application for such approvals,

(b) ...

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord...

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) ...

(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 the formula specified in his lease."

Decision

8. The hearing in this matter took place on 22 February 2013. The Applicant was represented by Mr Sheftel of Counsel. Ms Redding, a Solicitor, appeared for the Respodnent.

9. As the quantum of the costs had been agreed, it was not necessary for the Tribunal to consider the issue of reasonableness. The only issue to be determined by the Tribunal was whether the Respondent was contractually liable under clause 4(14) of the lease to pay the Applicant's costs as an administration charge.

10. Both parties made submissions in relation to the contractual liability created by clause 4(14). By this clause, the lessee covenanted with the lessor to:

> *"...pay all reasonable costs charges and expenses including Solicitors costs and surveyors fees incurred by the Lessor in or in contemplation of any proceedings or the preparation of any notice under Section 146 of the Law of Property Act 1925 notwithstanding forfeiture is avoided otherwise than by relief granted by the Court."*

11. Mr Sheftel made two submissions as to the construction of clause 4(14). Firstly, he submitted that it should be read as having a "full stop" after the word "proceedings". In effect, it was a stand alone part of the clause and was not contingent upon the second part of the clause. Therefore, the costs claimed by the Applicant were recoverable.

12. Secondly, and in the alternative, Mr Sheftel submitted that the second part of the clause allowed recovery by virtue of the decision of the Court of Appeal in ***Freeholders of 69 Marina, St Leonards-on-Sea v Oram*** [2011] EWCA Civ 1258; HLR 12, when a virtually identical clause was considered by the Court.

13. The brief facts of the case were that the landlord issued County Court proceedings against the tenant to recover service charge arrears together with the costs they had incurred in the Tribunal proceedings regarding the service charge. At first instance, it was held that the landlord could recover the Tribunal costs under a similar clause, as is the case here. The appeal to a Circuit Judge was dismissed, *inter alia*, for the same reason. The subsequent appeal to the Court of Appeal was also dismissed. It held that, given a determination to the leasehold valuation tribunal was required before the landlord could serve notice under section 146 of

the 1925 Act, the (landlord's) costs in relation to the tribunal hearing were incidental to the preparation of the section 146 notices and were recoverable under the relevant clause. Mr Sheftel submitted that the facts of this case were identical to ***Oram*** and the Applicant was entitled to recover the Tribunal costs claimed.

14. In reply, Ms Redding, firstly, submitted that the wording of clause 4(14) was ambiguous and as such should in principle be construed ***contra proferentem*** against the Applicant. Secondly, she submitted that the terms of the clause were express and clear. It only permitted the costs incurred in relation to section 146 proceedings to be recovered and nothing else. Moreover, at the date of the proceedings, the Respondent's service charge account was in credit. Therefore, the Applicant had no basis for commencing forfeiture proceedings. For these reasons, ***Oram*** could be distinguished.

15. The Tribunal did not accept the first submission made by Mr Sheftel that clause 4(14) allowed the landlord to recover costs in or in contemplation of any proceedings. If this construction were correct, it would allow the landlord to unilaterally contemplate proceedings, for example, for debt recovery or breach of covenant, and then seek to recover the costs of doing so in any event. In other words, if the landlord (albeit incorrectly) commenced proceedings, it cannot be right or proper that he should then be able to recover his costs when a cause of action against the tenant did not exist.

16. In the Tribunal's judgement, clause 4(14) has to be read as a whole as to what was intended by the parties. As a matter of construction, the clause should be given its plain and ordinary meaning. The insertion of the word "or" is material. It envisages a number of steps that the landlord can take regarding forfeiting the lease. These are:

(a) contemplate forfeiture proceedings (when a cause of action exists); or

(b) prepare (and serve) a section 146 notice; or

(c) commence forfeiture proceedings.

All of the costs incurred in relation to one or more of these matters are expressly recoverable under clause 4(14).

17. However, before a landlord can do any of these things, he must now firstly apply to a leasehold valuation tribunal and obtain a finding that a tenant is in breach of one or more covenants and/or conditions in a lease. In the matter of ***Oram*** the Court of Appeal held that the costs of doing do fell within the ambit of an almost identical clause as clause 4(14). The case is a binding authority on the Tribunal, which it is obliged to follow and Mr Sheftel's second submission succeeds.

18. The Tribunal did not accept the submission made by Ms Redding that ***Oram*** could be distinguished here because the Respondent's service charge account was in credit at the time of the hearing as a result of an insurance rebate. It did not necessarily mean that the Applicant's cause of action to forfeit had been extinguished until the apportionment point had been decided in the earlier proceedings. Indeed, the Tribunal largely upheld the Applicant.

19. Accordingly, the Tribunal concluded that the Applicants agreed costs of £6,250 are recoverable and payable under clause 4(14) of the Respondent's lease.

Dated the 19 day of April 2013

Signed
CHAIRMAN
Mr I Mohabir LLB (Hons)