FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BJ/LSC/2020/0055**
HMCTS code (paper, video, audio)	:	**P: PAPERREMOTE**
Property	:	**19 UPPER RICHMOND ROAD, SW15 2RF**
Applicants	:	**(1)Mr G Pooler** **(2)Laxmi Properties Limited** **(3)Mr J Brewster** **(4) Mr and Mrs Vickers** **(5) Mr A Bechgaard**
Representative	:	**Mr Pooler**
Respondents	:	**(1) Mr George Steele** **(2) Mr Michael Steele**
Representatives	:	**Bishop & Sewell Solicitors**
Type of application	:	**For the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985, and an order in respect of costs under section 20C of the Act, and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002**
Tribunal members	:	**JUDGE SHAW**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of decision	:	**5th November 2020**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote determination on the papers which has been consented to by the parties. The form of remote hearing was P:PAPERREMOTE. A face-to-face hearing was not held because of the pandemic, and all issues could be determined on paper, following narrowing of the issues in this case and the revised Statements of Case submitted by the parties. All necessary documents were in the bundle submitted to the tribunal, the contents of which have been noted. The order made is as appears at the conclusion of this decision.

The Application

1. This case commenced as an application by the Applicants, all of whom are leaseholders of flats at 19 Upper Richmond Road, SW15 2RF, for a determination as to the reasonableness and payability of various service charges, demanded by the Respondent freehold landlords. The Applicants sought determinations 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 to Respondent in respect of the relevant service charge years.

2. Unusually, there have been three sets of Directions from the tribunal in this case, dated 3rd March 2020, 11th August 2020 and 4th September 2020. This has arisen because the case has contracted substantially since the date of issue of the application, to the extent that there are now two areas of dispute, which the parties have agreed can be dealt with by paper determination. Revised Statements of Case have been prepared, consequent upon the most recent Tribunal directions, to which statements reference will be made below.

3. It is proposed to deal with the areas of dispute separately, to summarise the parties' respective arguments, and to give the Tribunal's determination on each issue.

Analysis and determination of the issues by the Tribunal.

FIRST ISSUE

Legal Costs of Bishop and Sewell LLP

4.The first remaining item of dispute between the parties is in respect of a sum of £900 described in the Respondent's Statement of Case (paragraph 3.2.2) in the following manner:

"The £900 of professional fees are legal fees invoiced by R's solicitors Bishop & Sewell in relation to the service charge. These will stand and (sic) fall with the FTT's interpretation of costs recovery under the leases, and/or A's s20C LTA 1985 application."

5.The Applicants deal with this claim in their revised Statement of Case, prepared consequent upon the most recent further tribunal Directions. They cite clause 3 of, and paragraphs 10 and 11 of the Fourth Schedule to, the lease, to confirm that legal costs are only recoverable under the lease in defined circumstances, viz: in the course or contemplation of forfeiture proceedings, in the preparation of a schedule of dilapidations and in the context of an application for consent of some kind under the lease.

6. The Applicant's point out that none of these can apply in this case. The applicants cite various authorities, essentially in support of the long established principal that a landlord seeking to rely upon a breach to claim forfeiture, must exercise an unequivocal election to forfeit (generally the issue and service of proceedings) before performing any acts of affirmation of the lease. The need for an election arises when the landlord has knowledge of the breach or breaches which give rise to the potential action for forfeiture. In this case there were demands for rent and service charges throughout 2018 and 2019, precluding the right to forfeit based on the alleged breaches, and giving rise to a waiver of these alleged breaches for forfeiture purposes.

7. In the Respondent's Revised Statement of Case, there seems little serious argument as to the points taken by the Applicants in respect of these claimed legal fees. Instead, the Respondent relies upon paragraph 7 of Schedule 5 to the lease, which provides for recovery from the leaseholder by the landlord, of *"all other expenses ……..incurred…..in and about the maintenance and proper and convenient management of the building."*

8. It will immediately be observed that this provision does not deal with legal fees at all, but that, says the Respondent, presents no problem, because the

claim for legal fees is not in fact such a claim at all (although it has always hitherto been presented as such by the Respondent) but in fact is a claim for the professional fees of Bishops Associates Chartered Surveyors, for work carried out prior to and in contemplation of the section 20 works. The relevant invoice from the surveyors has been produced. The service charges in respect of those works were contested by the Applicants, were not proceeded with, and the claim for those charges by the Respondent against the Applicants has been withdrawn in these proceedings.

9. The Respondent gives no explanation for this change of assertion, but says that, although the works have not been proceeded with, the Tribunal should not make the order sought by the Applicant, because they are recoverable under the provisions of the lease referred to above.

10. The Applicants response, by way of Reply, is to point out that the £900 has never been claimed as anything other than Legal Fees, and indeed there have been sworn statements of truth to this effect. They add that:

"For completeness however, any survey carried out by the Respondents' appointed surveyor Bishop & Associates Surveyors was incidental to the preparation of the formal scope of works, the costs of which the Respondents have been told will be chargeable to them in the form of a 10% commission or fixed fee. To the extent that Bishop and Associates Surveyors' fees have been charged to the Applicants, these should be credited to the service charge account to avoid double recovery."

Decision of the Tribunal on First Issue

11. There has been an unexplained transition in a Revised Statement of Case at the end of these proceedings, of the claim for Legal Fees, into a claim for surveyors' fees. There can be no question therefore that the claim for this sum *qua* legal fees must fail.

12. The fees relate, according to the surveyors' invoice now produced, to the preparation of a specification of works related to internal and external works at the subject property. Those works, or the service charges relating thereto were challenged in this application, following which, the claim relating to them (which was the major part of the application) was withdrawn, and the works have not taken place. It is correct, as the Respondent contends in relation to the second disputed point which will be dealt with below, that the Tribunal cannot know whether those works and attendant charges would have been upheld by the Tribunal, since they have been withdrawn from consideration, and are no longer before the Tribunal. However, by the same token, the Tribunal cannot make a judgment upon whether the fees incurred in association with those works, have been "*reasonably incurred*" for the purposes of the Act. It is possible they may have been – in which case subject to the possibility of double-

counting referred to by the Applicant at paragraph 10 above, it may be possible to recover them, or a proportion of them, from the Applicants in the context of such works, if they eventually proceed – or by determination of the Tribunal, in the event (hopefully unlikely) of this dispute re-surfacing in some subsequent application.

13. However for the purposes of this determination, and in the context of these proceedings, the Tribunal prefers the contentions on behalf of the Applicants to those of the Respondent, and for the reasons given above and as set out in the Applicants' Revised Statement of Case and Reply, the Tribunal finds in favour of the Applicant on the First Issue.

SECOND ISSUE

The Costs of these proceedings and the Section 20C Application

14. By virtue of section 20C of the Act, the Tribunal may make an order on application by the tenant, that costs incurred or to be incurred in these proceeding are not to be regarded as relevant costs in determining the amount of service charges payable by the tenant.

15. The Applicants make such an application in this case, and contend that such an order should be made, because the costs are irrecoverable under the lease (for the waiver reasons set out above and otherwise in the Revised Statement of Case). They further contend that this case was always substantially, though not exclusively, about the costs relating to the major works, which in the event was withdrawn and not proceeded with in this Application. In all the circumstances therefore it would be just and equitable under section 20C to make the oder.

16. The Respondent contends that it was never precluded by the waiver asserted by the Applicants for the reasons given at paragraph 9 of the Revised Statement of Case, and develops the argument alluded to above, that the making of an order under Section 20C, would be to pre-judge part of the application which is no longer before the Tribunal.

Decision of the Tribunal on the Second Issue

17. The Tribunal prefers the Applicants' contentions to those of the Respondent. As to the waiver point, in the face of the assertion that there is clear evidence that there was no intention to forfeit, the Respondent says merely (and carefully) that it denies that the evidence of a particular e-mail can be relied upon as evidence of waiver (rather than a firm assertion of an intention to forfeit). Further, it contends that it wished to *"consider"* its *"options"*. There is nothing to prevent a landlord considering its options if it wishes to do so. What it cannot do however is to affirm the lease whilst it is conducting that consideration, and hope to rely on forfeiture for the breaches it is considering. It is trite law that a landlord cannot simultaneously approbate and reprobate.

18. Further, the Tribunal considers that it is indeed just and equitable to make an order under section 20C in this case. The Tribunal has a discretion in this regard, and it seems to the Tribunal on the papers before it, that this case was mainly about the costs incurred in the context of proposed major works, which proposed works were not commenced, after this application was made – and the associated costs challenged were withdrawn by the Respondent. It does not seem just and equitable that the Applicants should be penalised in this regard, and it seems to the Tribunal that the costs should lie where they fall.

CONCLUSION

19. For the reasons indicated above the determination of the Tribunal is that:

(i) the sum of £900 referred to above is not payable by the Applicants to the Respondent in the context of these proceedings, and if it has already been paid, it should be refunded by way of credit to the service charge account

(ii) an order is made under both section 20C of the 1985 Act and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, that no part of the Respondent's costs of these proceedings shall be taken into account in determining the service charge payable, or administration charge in respect of litigation costs, payable by the Applicants.

Name: JUDGE SHAW

Date: 5th November 2020

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).