FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/00KF/LSC/2021/0058**
Property	**:**	**Flat 77, Marks Court Southchurch Avenue, Southend-on-Sea, Essex SS1 2RJ**
Applicant	**:**	**Barry Hawkins**
Representative	**:**	**Paul Robinson Solicitors LLP**
Respondent	**:**	**Wood Trustees Limited**
Representative	**:**	**Charles Russell Speechleys LLP**
Type of application	**:**	**Liability to pay service charges**
Tribunal	**:**	**Judge David Wyatt**
Date of directions	**:**	**29 March 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote decision on the papers. The parties are deemed to have consented to this matter being determined without a hearing. The form of remote decision was P:PAPERREMOTE. A hearing was not held because it was not necessary; all issues could be determined on paper. The documents I was referred to are those described in paragraphs 1 to 7 below. I have noted the contents.

Decision

The Tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

© CROWN COPYRIGHT

<u>Reasons</u>

Application

1. On 28 September 2021, the Applicant leaseholder applied for determinations under section 27A of the Landlord and Tenant Act 1985 (the "**1985 Act**") in respect of service charges from 2019 onwards. The Applicant also sought: (a) an order to limit recovery of the Respondent's costs of the proceedings through the service charge, under section 20C of the 1985 Act; and (b) an order to reduce or extinguish their liability to pay an administration charge in respect of litigation costs, under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (the "**2002 Act**").

2. The Applicant described the total value of the dispute as £335,384.54 or more. This was a proposed cost of major works to replace windows at Marks Court. The Applicant appeared to be contending that the statutory consultation requirements had not been complied with in relation to these proposed works and/or that the works should not be carried out.

3. The Applicant described Marks Court as six buildings accommodating 132 flats (one housing an on-site supervisor), with a "common trust deed" and individual leases. The lease of No.77 was made between a predecessor in title to the landlord, a maintenance trustee and a predecessor in title to the Applicant. The copy trust deed provided was made between a former landlord and a former maintenance trustee.

Procedural history

4. On 16 November 2021, I gave case management directions setting out the steps to be taken by the parties to prepare for a substantive hearing. It appears the Respondent, then the current maintenance trustee under the lease, learned of the proceedings for the first time when those directions reached it. They instructed their representatives, who asked for more time to produce initial disclosure documents (the first step required under the directions). They said the application was premature, and should be withdrawn. They said the proposed works were part of an "ongoing" consultation process in which the contractor had not yet been appointed and the project costs had not been finalised. They requested a case management hearing (**CMH**).

5. The parties produced copy documents in relation to the potential major works, including notices of intention in 2019 and 2020, and a statement of estimates in February 2021. They explained shortly before the CMH that notice had been given by the landlord at the request of leaseholders to seek to terminate the appointment of the Respondent as maintenance trustee under the relevant leases. The Respondent's representatives indicated that the consultation process, the proposed works and the likely costs would be reviewed in 2022.

6. The case management hearing on 21 December 2021 was attended by Mrs Lancaster of Paul Robinson Solicitors LLP for the Applicant, who also

attended. Ms Davies and Ms Turner of Charles Russell Speechleys LLP attended for the Respondent. Following discussion, particularly in view of the delay and uncertainty in relation to the proposed works/costs and termination of the appointment of the Respondent, the Applicant withdrew his applications under section 27A of the 1985 Act and paragraph 5A of Schedule 11 to the 2002 Act. I consented to the withdrawal. Pursuant to Rule 22(7) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the "**Rules**"), written notification of the withdrawal was given in the further directions issued by the tribunal that day.

7. However, the Applicant wished to continue his application for an order under section 20C of the 1985 Act and consented to this being decided based on written submissions, without a hearing. Ms Davies and Ms Turner agreed that appeared to be appropriate. I directed that, unless by 21 January 2022 any party requested an oral hearing, that application would be determined on or after 18 February 2022 based on written submissions, without a hearing. No such request was made. The parties have produced electronic bundles of the submissions and documents they rely upon (an electronic bundle of 40 pages from the Applicant, an electronic bundle of 165 pages of reference documents and submissions (nine pages) from the Respondent. I am satisfied that, pursuant to Rule 31(3), the parties are taken to have consented to this matter being decided without a hearing and that it is appropriate to do so based on the documents they have produced for the determination.

Review

8. Both parties produced relatively lengthy submissions. I do not propose to summarise all their arguments, but I have taken them into account. The following is only a broad description of key points.

9. Following the notices of intention in October 2019 and April 2020 for works which would include replacement of communal windows, a statement of estimates was given on 12 February 2021, with estimates ranging from £335,384.54 (Hart Development) to £520,660.33 (SJS Maintenance) including VAT, but excluding professional fees and VAT on those fees. The notice indicated planning consent for the proposed work had been obtained. It observed the reserve fund was unlikely to cover the whole cost of the works, so additional service charge contributions could not be ruled out, and it might be necessary to phase the works rather than replacing all windows as one project.

10. On 17 March 2021, the Applicant's representatives wrote challenging the notices. After a delay, the Respondent's agents (RMG) replied substantively on 25 May 2021, providing copies of the estimates (as requested) and extending the time for comments on these. They said the reason estimates had not been sought from suppliers nominated by leaseholders was that they were small domestic suppliers. The Applicant's representatives responded on 18 June 2021, pursuing the same points with additions (such as other contractors from whom it was

said estimates should have been obtained because they had been nominated). They received nothing further in response.

11. The Respondent's agents had already written to the Applicant on 26 April 2021 to answer 47 questions raised directly by the Applicant. Their letter answered those questions in considerable detail and said that the proposed project was at an early stage. The Applicant said he understood that letter was indicating Hart Development would be appointed, since they had submitted the lowest estimate.

12. In September 2021 the Applicant decided, in the absence of any response to the further letter from his representatives in June 2021, to make his application to the tribunal to determine payability of service charges. He considered the consultation requirements had not been complied with and/or the contract should not be awarded. The Applicant submitted (in effect) that it was reasonable for him to make the application because the Respondent could at any time have proceeded to award the contract without further warning and would not have needed to give a third-stage notice if they awarded to Hart Development, since they had submitted the lowest estimate. He said he was concerned that the Respondent could simply use all or most of the reserve fund for most of the costs and demand the balance from leaseholders at short notice. He referred to increasing demands for contributions towards the reserve fund.

13. Ultimately, at the CMH in December 2021, the Applicant decided to withdraw the substantive application because he recognised that the Respondent would have to review the proposed works and seemed unlikely to take action pending appointment of any new trustee, who would have to be made a party to proceedings for any determination to be binding on them. He said the application was justified at the time it was made (when notice had not been given to seek removal of the Respondent as maintenance trustee) given the failure of the Respondent to respond to the additional/repeated challenge which had been sent in June 2021 following their substantive responses in April/May 2021. He said it was reasonable to make the application pre-emptively, given the risks outlined above and the fact that it would of course take some time for an application to be determined.

Assessment

14. First, the Applicant said, I should consider whether the lease allows the Respondent to recover the costs of these proceedings through the service charge. The Applicant appears to be submitting that it does, but did not appear fully to have considered the relevant provisions and may not have considered the provisions described by the Respondent in their answering submissions. In the circumstances, it is not necessary in these proceedings for me to make a finding on this point. For the purpose only of these proceedings, I assume there is at least a real risk that the Respondent will seek to recover the costs of these proceedings through the service charge.

15. Next, the Applicant said, I should consider whether he made adequate attempts to resolve the issue with the Respondent before commencing legal proceedings. I am not satisfied that he did. He made some attempts, as noted above, but raised many points and was given detailed responses. Through his representatives, he pushed back, and some three months passed before he made his application. However, there was a delay of some two months between the first letter from his representatives and the substantive response from the Respondent. The Applicant would be in a far better position if he had given a simple pre-action warning to explain his concern that a contract could be wrongly awarded without notification and warn that the application would be made if reasonable assurance was not provided by a reasonable deadline.

16. Next, the Applicant said, I should consider whether the Respondent responded unreasonably to early attempts by the leaseholder to resolve the dispute. I do not consider that they did, although I bear in mind their failure to respond to the further letter in June 2021. There is some truth in the Applicant's criticism that the Respondent had been "*somewhat vague*" in their earlier correspondence, but they began the consultation process in 2019 and apparently had initial delays when they changed surveyors. After the statement of estimates in early 2021, they encountered robust opposition, at least from the Applicant, but then obviously spent time giving detailed responses to his questions and challenges, explaining in April 2021 that the proposed project was at an early stage and responding substantively in May 2021 to the first letter from the Applicant's representatives.

17. Next, the Applicant said, I should consider the financial circumstances of each party. The Applicant is an individual leaseholder, but produced no real evidence of his financial circumstances. The Applicant invited me to bear in mind the differences between him and the Respondent, and the respective firms of solicitors they had instructed. Finally, the Applicant observed (and I accept) that he had no control over the proposed removal of the Respondent as maintenance trustee and this was a determining factor in prompting the Applicant to withdraw the proceedings (given that this seemed likely to delay or change any decision in relation to the proposed works and meant that a determination against the Respondent alone might be useless).

Conclusion

18. Ultimately, the earlier communications from the Respondent could have been better. However, the Applicant could have taken a more co-operative approach or at least given specific pre-action warning, as outlined above. He had previously instructed his solicitors, but decided himself to issue an application which might have been better prepared and thought-through. It may be helpful to take a more focussed approach in future. Raising and debating many points might not always be as effective as careful consideration, taking specialist advice as appropriate, to focus on key issues and any good points. Further, as observed at the CMH, the costs of dealing with the remaining application under section

20C of the 1985 Act might be greater than the initial costs incurred up to the time of the CMH. The Applicant decided, as was his right, to continue his section 20C application and make relatively lengthy submissions. Those were answered in detail by the Respondent. Moreover, no valid application under section 20C was made by or on behalf of the other leaseholders of Marks Court. Accordingly, as the Respondent observed, the effect of the order sought by the Applicant would be to leave all the other leaseholders exposed to any risk of recovery of the Respondent's costs of the Applicant's applications through the service charge, but release the Applicant from any such risk.

19. In all the circumstances, I am not satisfied that it would be just and equitable to make an order under section 20C to prevent full or partial recovery from the Applicant of any costs the Respondent might be able to recover though the service charge in relation to these proceedings. This decision does not preclude any application under section 27A of the 1985 Act to determine the reasonableness and payability of any service charge in relation to the costs of these proceedings, including any issue of whether they are payable at all under the terms of the relevant lease(s).

Name: Judge David Wyatt **Date:** 29 March 2022

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).