FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/12UB/LSC/2022/000049**
Property	**:**	**117-131 (odds) The Cherry Building & 133-171 (odds) Great East Court Addenbrookes Road, Cambridge, CB2 9BA**
Applicants	**:**	**(1) The Cherry Building RTM Co. Ltd (2) Dr. Frank Gommer and other long leaseholders identified in the Schedule to the application (3) Great Court East Building RTM Co. Ltd**
Representative	**:**	**Dr. Frank Gommer**
Respondents	**:**	**(1) RMB 102 Limited (2) Vega Ground Rents No. 6 LLP (formerly known as E & J Ground Rents No. 6 LLP)**
Representative	**:**	**E & J Estates for First Respondent**
Date of Application	**:**	**31st August 2022**
Type of Application	**:**	**Section 27A Landlord and Tenant Act 1985 Determination of the liability to pay and reasonableness of service charges**
Tribunal	**:**	**Judge J. Oxlade Miss. M. Krisko BSc. (EST MAN) FRICS**
Date of Directions	**:**	**10th March 2023**

DECISION

For the reasons given below the Tribunal:

- refused to strike out the Respondent's application made pursuant to R 9(3)(d) and/or (e),
- admitted the Respondent's bundle filed on 6th February 2023 and skeleton argument,

- make an order pursuant to section 20C, as to the whole of the Respondent's costs caused or occasioned by the hearing, and in preparation for it
- make an order that the Respondent shall pay to the Applicants the hearing fee of £200
- refuses to make an order for the Applicants' costs unreasonably incurred in preparation for the hearing listed on 7th February 2023.

REASONS

Background

1. The application before the Tribunal is to determine the reasonableness of service charges for a past year (2015/16) and estimated charges for future years (2021/22 and 2022/3), in accordance with section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act"), set out in Annex 1 ("the Annex").

2. The Tribunal issued directions on 13th October 2022, which by paragraph 8 required the Respondent, by 7th December 2022, to file:

   (i) a response to the leaseholders' schedule in relation to disputed service charges (2015/16), explaining all matters relied on ("the Scott Schedule");
   (ii) a statement responding to the leaseholders' points, and which would include "any legal submissions in support of the service charges claimed, including argument";
   (iii) copies of relevant service charge demands/accounts/invoices, together with any documents relied on;
   (iv) any signed witness statement of fact upon which the Respondent relied.

3. On 5th December 2022 the Respondents applied for a short extension of time for compliance with paragraph 8, which was granted to 14th December 2022, in view of the Respondent's observation that the past service charges related to 2015/16, there had been numerous changes of managing agents and "our client needs the extension in order to continue its attempts to try to find any documentation relating to that period".

4. In the Scott Schedule, the Respondent made several points in respect of the 2015/16 charges: SDL were the managing agents at the time until 2018, who were not employed by the Respondent, and the Respondent had no means of securing the necessary documentation to be in a position to respond to the application; the block management business had been sold by SDL; there was no reason why such an application could not have been made before SDL ceased management; this part of the application should be struck out as being frivolous or vexatious or otherwise an abuse of process or alternatively that there was no reasonable prospect of this part of the claim succeeding.

5. In the witness statement of Paul Tolley (estate manager at Premier Estates, managing agent for the Respondent) made on behalf of the Respondent, he said that there had already been extensive litigation between the parties in respect of a dispensation from consultation - and now in respect of the service charges for 2015/16, which was so long ago, that the no relevant persons working for the Respondent would be able to provide evidence. Further, as the freehold owners and managing agents had changed, he had been unable to obtain any records or documents other than those publicly available. Further, (i) 11 of the 24 listed lessees had no interest in the outcome of the application, as they were not owners at the time, (ii) the Respondent should not be required to respond to the application relating to 2015/16 as the Respondent only acquired the freehold on 26th July 2019 from E & J Ground Rents No 6 LLP; LLP is no longer in the Respondent's group of companies having been subsequently sold in August 2019 (iii) SDL business was sold to HML. So, the claim in respect of 2015/16 should be struck out or 11 of 24 should be barred from claiming sums in respect of it.

6. As permitted by paragraph 9 of the Directions, the Applicants filed a statement in reply in which the following points were made: (i) the funds challenged by the leaseholders are funds held in trust, and so not bound by the assets of the landlords themselves, (ii) the old and new landlords were associated companies for more than 2 years, and (iii) all companies are registered at the same address, all belong to the same group of companies controlled by James Edward Tuttiett – had there been at "at arms' length" sale, then the lessees would have been in a position to buy it, yet were not offered the opportunity.

Hearing

7. The applications were listed before the Tribunal for hearing on 7th February 2023, the day before which the Respondent's sought to file a skeleton argument and a bundle of documents.

Preliminary Applications

8. At the commencement of the hearing Ms. Ackerley, Counsel for the Respondent made applications to admit late, both her skeleton argument and bundle of documents (consisting of 51 pages), which application was opposed by the Applicant. In respect of the skeleton argument, Ms. Ackerley made the point that it was common practice for these to be filed late in the day, once the evidence was in, and simply for the convenience of all, in summarising what a party would say. As for the documents some were repeats, some were in the Applicant's possession from the section 20 consultation, some were invoices relating the budgeted items, and some only obtained after the time for filing evidence was closed; there was no prejudice to the Applicant.

9. Further, she made application to strike out part of the Applicant's claim, relating to 2015/16, pursuant to rule 9(3)(d) and (e) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the Rules"). The principle argument being that the Respondent is not the correct party; the freehold was purchased on 26th July 2019, and so not the Respondent was not a party to the lease before that, being a company, and so with its own legal identity. It cannot be liable for matters before purchase; section 3(3) of the Landlord and Tenants (Covenant) Act 1995 ("the 1995 Act")

applies. She was not aware of any case law which specifically addressed the applicability of this to service charges demanded and paid "on account"; on any view, this ownership was three years after the 2015/16 year in issue, and so could not be "caught" by any adjustment charge argument. The key point was that there was no reasonable prospect of success.

10. There were two points previously made in the statement of Mr. Tolley, which were reinforced: 11 of the 24 lessees were not owners in 2015/16 and could not benefit from any decision; she conceded the remaining 13, could do so; the second point was that whilst not a limitation period point (being 12 years for a deed) and so not statute-barred, it was too difficult to go back 6 years, were there had been changes of managing agents. The Applicants had sought to take issue with this – shown in the correspondence – and should have taken it forward then, if possible, and had not done so; there had been inactivity for several years. There is (page 156) a spreadsheet of sums repaid, which is not disclosed, with the very real possibility that these matters have been resolved.

In reply

11. The Applicant objected to the admission of late evidence and skeleton argument made on the eve of the hearing; it was so late that the Applicant had no reasonable chance to respond. It was a continuation of how the Respondent has been found to have behaved previously – where in previous proceedings the Tribunal said that the current freeholder had " failed to work with the lessees". The Respondent had failed to comply with the Directions; very little had been provided to date – amounting to limited engagement with the schedule and Mr. Tolley's witness statement. There had been a substantial bundle provided with the dispensation application, and Dr. Gommer should be forgiven for not being able to recall every document, particularly if taken out of context. There seems no point in replicating documents in this fresh bundle. There was no good reason for late documents to be filed. The Respondent had twice asked for extensions of time to produce documents, and not done so. It deprived the Applicant of the chance to study, consider and respond. He addressed the history of the dispute in respect of the railings which had been ongoing since October 2022, and it was not a good explanation to say that the documents had just been obtained.

12. As to striking out of part of the claim on the basis of the change of ownership, this was resisted. He set out some of the history from early 2019, that they had no chance to challenge transfer of the freehold within the group, and that the people in the organisations – freeholders and agents – were basically the same people, from the same premises. As to the delay in bringing the claim, he set out the attempts to engage with the Respondent in 2019 and since, and that the pandemic had intervened; there had been no spare capacity to deal with this. They had done so within 6 years, and paid under protest. He made the point that this was not about *company* funds, but *lessee* funds; there should be no confusion about this. The Respondent was clearly the party who "inherited" the funds. If the Tribunal acceded to the Respondent's application, it would open the door to a misuse of funds, and deprivation of protection. As for the schedule attached to page 156, this could be disclosed.

13. In reply the Respondent said that the order sought to strike out did not preclude the Applicant from issuing against the correct freeholder; this was about making sure the correct parties were joined. Further, there was no evidence that any funds "inherited" by the Respondent related to 2018/19; it could not lead to unfairness.

Tribunal's decisions on preliminary applications

14. The Tribunal finds that the Respondent's engagement with and participation in the proceedings – largely consisting of a response to the Scott Schedule and witness statement - had been minimal and late, until the flurry of activity the day before the hearing. The Respondent provided no adequate explanation for providing a bundle of documents so late in the day, namely the day before the hearing. Further, the Respondent overlooked the terms of paragraph 8 of the directions which provided (with adjusted time limits) that by 7th December 2022 (extended to 14th December 2022) the Respondent should provide "any legal submissions in support of the service charges claimed, including argument". The Scott Schedule said that the 2015/16 part of the application should be struck out as frivolous, vexatious, an abuse of the Tribunal process or had no reasonable prospect of success; in support it referred to changes of management, that the SDL had sold to HML, and that the application could have been made prior to this change and statement of Mr. Tolley. However, it did not refer to the change of freeholder, which is the principle point now relied on by Ms. Ackerly; there had been a failue to comply with paragraph 8.

15. It is correct to say that in the witness statement of Mr. Tolley (para 7) he did refer to the change of freeholder, and said that the "Respondent should not be required to respond to the application", along with the extensive litigation point, the change in personnel, the inability to secure records/documents, and locus standi point in respect of 11 of the 24 lessees. It however, failed to meet the requirement of the directions (para 8), namely, *to set out the legal submissions*.

16. Whilst the Tribunal acknowledges that the Respondent is not required to point the Applicant in the direction of the former freeholders, and to say "it would be in your interests to join the former freeholder", the Directions of the Tribunal were aimed at ensuring fairness in the proceedings, and – had they been complied with – would have given the Applicant at the very least an opportunity to take legal advice, to consider joining the former freeholder and to have considered its position.

17. The Applicant was without notice of the basis for the legal arguments which would be made on the morning of the hearing; indeed the skeleton argument failed to reference the legislation, said to be relied upon, namely the 1995 Act The application to strike out part of the application (relating to 2015/16 s/c year) was made only on the morning of the hearing, but which the Respondent could have done on receipt of the application, or any time in the 5 preceding months, had it wished to rely on the point that it could not be liable for the 2015/16 because it was not the freehold owner. This late participation and clarification does not accord with the requirement in rule 3(4)(a) and (b) of the Rules, to help the Tribunal to further the overriding objective and co-operate with the Tribunal generally.

18. The Tribunal notes that rule 9(3) is expressed as "may", not "will"; it is discretionary in nature. It would be preferrable to have both freeholders in the proceedings, with one let out when there is sufficient certainty as to whom is liable. There are powerful arguments to be made by all concerned. The Tribunal therefore refused the application to strike out the 2015/16 part of the application, and joined the former freeholders. The Tribunal made directions to progress the application.

19. The Tribunal now grants the Respondent's application for the late filing of the evidence which had been provided the day before the hearing; there is now no prejudice to the Applicants' who will have time to consider it; to have admitted it on the day could have caused prejudice, were it not for adjourning the final hearing.

S20C

20. There was no issue but that the Respondent would - under the terms of the lease - be permitted to add its costs to the service charge account. The Applicants had as part of their written application made a s20C application.

21. The Tribunal heard arguments from both parties; the Respondent relied on the change of freeholder point, and that the Applicants could never succeed on this aspect of the claim; the point was set out in the Scott Schedule and statement; the litigant in person is put in no better position than that represented individual, and had been in a position to respond to the application made that morning. The Applicant made the point that the very same personnel are in charge of both companies – the former and current freeholder; the companies were related, and the funds are handed over on a trust basis; the Respondent had been directed to make legal submissions before the day and failed to do so; it was not reasonable to add to this on the night before the hearing. Further, the Respondent had twice asked for extensions of time, and still were not ready. It was the Respondent's conduct which had led to the wasted hearing.

22. The power to make an order under section 20C is discretionary, and requires the Tribunal to make an order which it considers just and equitable. In this case it is appropriate for the Tribunal to make the order, so that the Respondent is prevented from adding to the service charge account any element of the costs caused or occasioned by the hearing on 7th February 2023, and preparing for it. This is because the Respondent failed to comply with Directions; had it complied, the Applicants may have joined the previous freeholders as part of the application, and had the evidence relating to 2021/2 and 2022/3 been filed in time, that aspect could have proceeded. As noted above the Respondent's engagement with and participation in the proceedings had been minimal and late, until the flurry of activity the day before the hearing. The Respondent relies heavily on the lack of access to and so availability of documentation relating to 2015/16, yet there was no evidence filed of attempts to secure it despite this being one basis on which the application for an extension of time was sought. The Respondent failed to embrace the requirement to help the Tribunal and to further the overriding objective and to co-operate generally.

Hearing Fees

23. The Applicants made an application for recovery of the costs for preparing the bundles, pursuant to rule 13(1) (b) on the basis of the Respondent having behaved unreasonably in conducting proceedings and 13(2) reimbursement of the hearing fee (£200); the Respondent had acted unreasonably, which extended to failing to provide budgets for the years, but had filed nothing at all until the day before the hearing. To provide documents as late as possible amounted to gamesmanship, and to make it impossible for the Applicants to fairly participate.

24. In reply, Ms. Ackerely said that the test in 13(1)(b) was strict, but there was no evidence of behaviour which could meet the high threshold. The Respondent's position was adequately set out in the Scott Schedule and statement of Paul Tolley. The Respondent had not sought to adjourn the proceedings. The Applicants were aware of the position and it was not for the Respondent to tell the Applicant how to run their case. The threshold is simply not met.

25. The Tribunal finds that the Respondent should reimburse the Applicants with the hearing fee of £200, by virtue of the Respondent's late and minimal participation; the above summary of events and findings suffices to justify the order, and to explain why – as a matter of fairness – the hearing could not proceed. However, the application for wasted costs, requires a higher standard of proof; inattention and poor preparation is not sufficient, as the threshold requires (in effect) professional negligence, which is not established on the basis of what the Tribunal has heard.

Summary

26. For the reasons given above the Tribunal:

- refused to strike out the application made pursuant to R 9(3)(d) and/or (e),
- admitted the Respondent's bundle filed on 6th February 2023 and skeleton argument,
- make an order pursuant to section 20C, as to the whole of the Respondent's costs caused or occasioned by the hearing, and in preparation for it
- make an order that the Respondent shall pay to the Applicants the hearing fee of £200
- refuses to make an order for the Applicants' costs unreasonably incurred in preparation for the hearing listed on 7th February 2023.

……..

Judge J Oxlade

10th March 2023

Appendix

Relevant Extracts of applicable Law

S20C of the Landlord and Tenant Act 1985 ("the 1985 Act")

"(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 First-tier Tribunal are not be regarded as a relevant costs to be take into account in determining the amount of any service charges payable by the tenant or any other person specified in the application.

(2)….

(3) The Court or Tribunal to which the application is made may make an order on the application as it considers just and equitable in the circumstances".

S27A of the 1985 Act

(1) An application may be made to the [appropriate Tribunal] for a determination whether a service charge is payable and …
(2)…

(3) An application may also be made to the [appropriate Tribunal] for a determination whether, if costs were incurred for services, repairs, maintenance, improvement, insurance, or management of any specified description service charge would be payable for the costs…"

Section 3(3) of the 1995 Act

"Where the assignment is by the Landlord under the tenancy, then as from the assignment the assignee –

(a) becomes bound by the landlord covenants of the tenancy except to the extent that –
    (i) Immediately before the assignment they did not bind the assignor, or
    (ii) they fall to be complied with in relation to any demised premiss not comprised in the assignment; and
(b) becomes entitled to the benefit of the tenant covenants of the tenancy except to the extent that they fall to be complied within in relation to any such premises."

Sch 11 Commonhold and Leasehold Reform Act 2002 ("the 2002 Act")

5(1) An application may be made to the appropriate Tribunal for a determination whether an administration is payable and if it is as to

…

(c) the amount payable

Regulation 9 of the Rules

"9(3) The Tribunal may strike out the whole or part of the proceedings or case if –

(d) the Tribunal considers the proceedings or case(or part of them) or the manner in which they are being conducted, to be frivolous, or vexatious, or otherwise an abuse of the process of the Tribunal; or

(e) the Tribunal considers there is no reasonable prospect of the applicant's proceedings or case, or part of it, succeeding"

Reg 13 of the 2013 Rules

"(1) The Tribunal may make an order in respect of costs only –

(a) under section 29(4) of the 2007 Act (wasted costs) …

(b) if a person has acted unreasonably in bringing, defending, or conducting proceedings in –

(i)….

(ii) a residential property case..

(2) The Tribunal may make an order requiring a party to reimburse any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor

(3) The Tribunal may make an order under this rule on an application or its own initiative.

(7) The amount of costs to be paid under an order under this rule may be determined by –

(a) summary assessment by the Tribunal".

Regulation 3 of the 2013 Rules

(4) Parties must-

(a) help the Tribunal to further the overriding objective
(b) co-operate with the Tribunal generally