FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/OODA/LSC/2018/0006**
Property	**:**	**Flat 4 232 Harehills Avenue Leeds LS8 4HX**
Applicant	**:**	**Antony Trevor Coleman and Irene Joan O'Neil**
Respondent	**:**	**G & O Real Estate Ltd**
Type of Application	**:**	**27A Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Mr John Murray LLB** **Ms. Dianne Latham MRICS**
Date of Decision	**:**	**29 March 2023**

DECISION

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DECISION

The Tribunal finds that in the present case the lease provisions would not entitle the Respondent to recover costs of proceedings brought by the Applicant.

The Tribunal finds that in the previous proceedings MAN/OODA/LSC/2016/0089 the Respondent has not produced evidence that clause 2.11 entitles it to recover costs of those proceedings, and that even in the event it had, the Tribunal would be minded to make an order under s20C Landlord and Tenant Act 1985 to prevent it adding it's costs to the service charges.

INTRODUCTION

1. The Applicants applied to the Tribunal to determine liability to pay and the reasonableness of service charges under s27A Landlord and Tenant Act 1985 and Schedule in respect of Flat 4, 232 Harehills Avenue, Leeds LS8 4HX ("the Property") for the service charge years 2011 to 2017.

2. A decision was made on the application on 14th November 2022 but the issue of whether the Tribunal should make any order under s20C Landlord and Tenant Act 1985 within proceedings MAN/OODA/LSC/2016/0089 or the present proceedings remained outstanding.

3. The Tribunal identified that the issues for determination (in relation to both sets of proceedings) were:
   (a) Whether legal costs are chargeable under the lease
   (b) If so, whether any necessary preconditions were met
   (c) Whether the Tribunal should make any order under s20C Landlord and Tenant Act 1985

4. The Tribunal directed the parties to provide statements in relation to the issue of cost and that it would reconvene for a paper determination.

SUBMISSIONS FOR THE RESPONDENT

5. The Respondent submitted a statement by Matthew Pennington, Legal and Sales Team leader at Blue Property Management UK Limited, the managing agent for the Respondent.

6. He relied upon clause 2.11 of the lease, a provision that obliged the leaseholder "To pay all costs and expenses (including solicitors and surveyors fees) incurred by the Landlord for the purposes of and incidental to the preparation and service of a notice of proceedings under Sections 146 and 147 of the Law of Property Act 1925 notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court and for the purpose of and incidental to the service of all notices

relating to wants of repair condition or decoration of the Premises whether served during or after the expiration or sooner determination of the Term."

7. He maintained that by clause 2.11 the Applicant was obliged to cover the costs and expenses of the Respondent in the proceedings to date, as these proceedings were undertaken for the purpose of the eventual service of a notice under Sections 146 and 147 of the Law of Property Act 1925. He noted that the current Respondent was previously the Applicant in the prior proceedings from which the costs originate, and brought proceedings against the Applicants.

8. The costs sought were £1737 being composed of the Application Fee, Hearing Fee and Legal Fees.

9. He explained that the proceedings were necessary, because in the absence of an admission by the leaseholder that service charges were due and payable, s81(1) of the Housing Act 1996 requires a court or Tribunal determination of the amount payable.

10. He stated that Blue Property's normal procedure for pursuing service charges was to seek payment of the balance from a mortgage lender, but as the Applicants had no mortgage he was unable to take this step and had to issue proceedings in the Tribunal.

11. He stated that the proceedings were consequently action incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 and that costs were consequently recoverable under clause 2.11.

SUBMISSIONS FOR THE APPLICANT

12. The Applicant sent an email to the Tribunal stating:
    (a) He did not believe the Respondent had a right to recover costs as it was asked for originally
    (b) After the first hearing, where the Tribunal had found in the Applicants' favour, no costs were awarded to them.
    (c) The amount of costs being asked for he believed were excessive.

THE DETERMINATON

13. The Respondent identified that the provision in the lease entitling them to charge costs was clause 2.11, which obliged the leaseholder to pay costs when Tribunal proceedings to determine service charges were payable, as a s146 notice could not be served until the issue was determined.

14. This provision for costs has been considered by the Tribunals and Courts on many occasions, and most recently by the Court of Appeal in the case of London Borough of Tower Hamlets v Khan [2022] EWCA Civ 831.

15. In Khan, the Local Authority landlord similarly sought to recover costs incurred in obtaining a determination that service charges were payable, on the grounds that the determination was required as a pre-condition to the forfeiture of the lease and that the costs were therefore "incidental" to the service of notice under section 146 of the Law of Property Act 1925.

16. The Court of Appeal identified that costs "incidental to" proceedings were different from costs incurred "in contemplation" of those proceedings, and in its decision considered in detail the precise meaning of the word "incidental" and held that its natural meaning was to suggest something lesser or subordinate.

17. The Court held that in circumstances where no section 146 notice had actually been prepared, it was doubtful whether the costs of proceedings to obtain a determination that sums were payable were incidental to it. Moreover, to hold that the substantial costs involved in conducting these proceedings were incidental to the preparation and service of the notice would be "a case of the tail wagging the dog", (per Arden LJ, Court of Appeal Contractreal v Davies. 2001)

18. In the previous proceedings, Case Number MAN/OODA/LSC/2016/0089 the Respondent was the Applicant and consequently could have submitted that a s146 notice was contemplated; however the Respondent has produced no evidence to the Tribunal that this was in fact the case. A statement served at this stage setting out the requirements of s81 of the Housing Act 1996 falls short of being any such evidence.

19. In any event the Tribunal in the 2016 case found that much of the service charges were not payable owing to failings on the part of the Applicant to follow statutory consultation procedures. Consequently even if costs were recoverable under the lease, this Tribunal would be minded to make an order under s20C to prevent them being recovered.

20. In the present proceedings, the Applicant sought clarification in the Tribunal as to service charges payable, and consequently there can be no suggestion that clause 2.11 could ever engage, and there is no need to make any order under s20c.

John Murray
Tribunal Judge