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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CAM/42UH/LVL/2017/0003
Property	:	4 & 6 The Homestead, South Green, Southwold, Suffolk IP18 6EX
Applicant	:	Homestead (Southwold) Management Company Limited
Represented by	:	Mr Andrew Marsden (Counsel)
Respondents	:	(1) Mrs M MacDonald (Flat 4) (2) Mrs M J Garton (Flat 6)
Represented by	:	(1) Mr A MacDonald (Lay Representative) (2) Mr David Mitchell (Counsel)
Date of Application	:	20th September 2017
Type of Application	:	Section 35 Landlord & Tenant Act 1987 Lease variation
Tribunal	:	Judge G M Jones Mr G F Smith FRICS
Date and venue of Hearing	:	9th March 2018 Ipswich County Court

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FINAL ORDER

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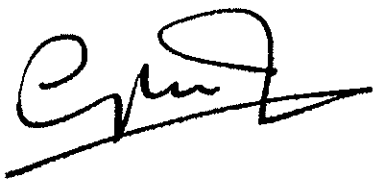
1. The draft Deed of Variation submitted by the Applicant's solicitors is hereby approved as drawn. The Tribunal will retain a copy of the submitted draft for a period of three months from the date of this Order.

2. The Tribunal makes no order as to costs.

Judge G M Jones
9th July 2018



REASONS FOR DECISION ON COSTS

The Issues for Decision

1. In the Order dated 12th April 2018 by way of Preliminary Decision in this case, the Tribunal directed that the Applicant should submit a revised draft Deed of Variation to the Respondents' leases. Such a draft has now been submitted in accordance with the principles set out in Preliminary Reasons of the same date and is approved by the Tribunal as drawn.

2. The Applicant has made an application against both Respondents for costs and, in accordance with the Directions Order its Counsel Mr Marsden has submitted written representations on costs. The Tribunal considers that those representations, when read together with the costs schedule, by necessary implication include an application that the Respondents should reimburse the application and hearing fees.

3. The First Respondent Mrs MacDonald resists this application and has submitted written representations explaining why. She makes no application for a costs order, having acted in person, with the assistance of her husband. The Second Respondent Mrs Garton also resists the Applicant's application. Through Counsel, she seeks an order for costs against the Applicant and an order under section 20C of the Landlord & Tenant Act 1985 to prevent the Applicant from adding any of its costs to her service charge account; her Counsel Mr Mitchell has submitted written representations on those issues. The Tribunal has read all the written submissions.

The Legal Framework

4. In this type of case, the Tribunal has no general jurisdiction to make party and party costs orders. The Tribunal has power under section 20C to make an order, on the application of a tenant, that all or any of the costs incurred by the landlord in connection with proceedings before the Tribunal shall not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any person specified in the application. Also, under Rule 13(1) of the Tribunal Procedure Rules 2013 (SI2013/1169) the Tribunal may make an order in respect of costs only -

   (a) Under section 29(4) of the Tribunals Courts & Enforcement Act 2007 (wasted costs) and the costs incurred in applying for such costs;
   (b) If a person has acted unreasonably in bringing, defending or conducting proceedings in ... (iii) a leasehold case...

   and under Rule 13(2), the Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any [application or hearing] fee paid by the other party.

The Substantive Decision

5. The Tribunal reminds itself of the outcome of the hearing. In summary, the Tribunal rejected the Applicant's request to include in the Deed of Variation (much of which was not in issue) provisions designed to permit the Applicant company to recover its own administration costs through a so-called "Company Charge". This was a hotly contested issue and much of the hearing was spent in discussing it.

6. The Tribunal's reasons for rejecting this proposed variation were two-fold. Firstly, the Tribunal considered that the Company Charge covered costs incurred for the benefit of the landlord and not for the benefit of the tenants. Secondly, and more importantly for present purposes, the Tribunal considered that the issue had already been decided in earlier Tribunal proceedings and was thus subject to an issue estoppel.

7. The Tribunal rejected a provision designed to give the landlord power to recover any interest incurred on commercial borrowing, holding that such power should be limited to interest incurred on borrowing related to unanticipated emergency expenditure. The approved draft Deed of Variations refers to unforeseen emergency expenditure, which fits the bill, and to interest at market rates, which is clearly an appropriate measure. Any such expenditure would, of course, be subject to the test of reasonableness under section 19 of the 1985 Act.

8. The Tribunal rejected as unnecessary, undesirable and outwith its jurisdiction a provision (not disputed by the Respondents) designed to enable the landlord to recover from tenants the cost of improvements the landlord might reasonably decide to provide for the comfort and convenience of the tenants.

9. The Tribunal approved uncontroversial administrative provisions; provisions for interim service charge payments; and provisions for payment of interest on rent or service charges paid late, these issues having been controversial but not, in the end, disputed before us.

10. Mr Marsden reminds us of our duty to give effect to the overriding objective set out in Rule 3 of the Procedure Rules, i.e. to deal with the case fairly and justly. This expressly includes (inter alia) dealing with the case in a manner proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and the Tribunal. We must apply these principles in exercising any power under the Rules.

11. The issues we were asked to decide were largely legal issues, not dependent upon the conduct of the parties, but designed to regulate the future management of a building over a very long period and regardless of who the future landlord and tenants might turn out to be. The hearing bundles placed before us amounted to 443 pages of correspondence etc., the vast majority of which was not referred to at the hearing. Accordingly, the inclusion of such correspondence could be justified (if at all) only in support of a costs application under rule 13. Otherwise, the costs associated with the inclusion of those documents must be considered to be wasted costs.

12. None of the written representations directed our attention to clear offers of compromise on either side that have been unreasonable rejected. That would be usual in a case where it is alleged that any party has been guilty of unreasonable conduct in correspondence. It is commonplace in litigation (particularly property litigation) for there to be exchanges of correspondence containing offers, rejections and counter-offers. Something quite out of the ordinary is required to constitute unreasonable conduct by way of unnecessary or inappropriate correspondence sufficient to justify a costs order under rule 13. In our judgment, the ebb and flow of correspondence about the issues in this case does not constitute unreasonable conduct on either side.

13. It is apparent that there has been a complete breakdown of mutual trust and confidence between the parties and that the Respondent tenants are unhappy about the management of the building and distrustful of the landlord's motives. However, there was no service charge dispute before us and we made no findings on those issues. Correspondence relating to such issues was clearly irrelevant to the current proceedings except, perhaps, as examples of what can go wrong in relations between landlord and tenant. Such examples are of little assistance to an expert Tribunal and, in this case, we consider that it was disproportionate to include such correspondence in the hearing bundle.

14. Mr Marsden says the Applicant had to bring the Respondents before the Tribunal and we accept that. But that is not enough to justify a costs order under rule 13. His best point on costs appears to be that the Respondents were, at least until the exchange of skeleton arguments, unclear about what they would or would not agree. He says the company charge issue was not important and could have been the subject of compromise. However, he does not direct our attention to any correspondence offering such a compromise, let alone any unreasonable refusal of a reasonable offer.

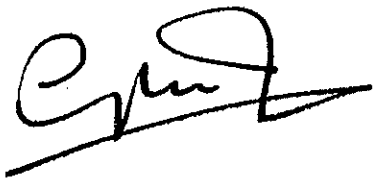
15. Mr Mitchell's best point appears to be that his client's statement of case made her position clear, which we accept. He says it was unreasonable to pursue the company charge issue as it had already been decided by a previous Tribunal. We do not agree. The justice of the situation is far from obvious, the principles of issue estoppel are complex and, in our judgment, it was not unreasonable for the Applicant to pursue the point.

16. As regards Mrs MacDonald, we take the view that it was not unreasonable for a litigant in person to ask the Tribunal to decide issues that most lay persons could not reasonably be expected to grapple with unaided.

17. Moreover, no party was wholly successful or wholly unsuccessful. Accordingly, we decline to make any costs order on either side. In our judgment no party has behaved so unreasonably as to justify a costs order under rule 13.

18. Before deciding whether to make an order under section 20C, the Tribunal must first consider what can be recovered as service charges under the Respondents' existing leases – and from the other tenants under their revised leases. Certainly, under the terms of the Deeds of Variation entered into voluntarily by other tenants, the legal costs and expenses of enforcing the terms of the leases and any other reasonable and proper expenses incurred by the landlord in and about the ... proper and convenient management of the premises are recoverable as service charges. But there is no such provision in the original leases, only a covenant under clause 6 by the landlord to apply the ground rents to expenses including legal fees ... reasonably necessary to ... enforce the obligations on the part of the tenants and a covenant under paragraph 18 of Schedule 7 by the tenant to contribute to the costs incurred by the landlord in carrying out its obligations under Schedule 7, which covers insurance, maintenance, repair and accounting.

19. Accordingly, in our judgment, the costs of and arising out of this Application are not recoverable from the Respondents and no order under section 20C is necessary. The other tenants may be liable, under their revised leases, to contribute to the Applicant's reasonable costs of the Application. There is no application before us for an order under section 27A or section 20C in favour of those other tenants. We make no finding as to the extent to which the Applicant's claimed costs were reasonably incurred. It will be for those other tenants to make an application if the figures cannot be agreed.



Judge G M Jones
9th July 2018