

UPPER TRIBUNAL (LANDS CHAMBER)



**UT Neutral citation number: [2012] UKUT 102 (LC)
Case Number: LRX/26/2011**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT- service charges – Landlord & Tenant Act 1985 – treatment of in-house solicitor’s legal costs – to be treated in the same way as independent solicitor’s costs - letter charges – whether within terms of lease – fair hearing.

**IN THE MATTER OF AN APPEAL AGAINST A DECISION OF
THE LEASEHOLD VALUATION TRIBUNAL OF THE
LONDON RENT ASSESSMENT PANEL**

By

OM PROPERTY MANAGEMENT LTD

**Re: 36 Culpepper Close,
London,
N18 2DZ**

Determination on the basis of written representations

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The following cases are referred to in this decision:
(the Court of Appeal decision in *Re Eastwood* [1985] 1 Ch 112)
Henderson v Merthyr Tydfil Urban District Council [1900] 1 QB 434
Maes Finance Ltd v W. G. Edwards & Partners [2000] 2 Costs LR 198
Cole v British Telecommunications PLC [2000] 2 Costs LR 310

DECISION

Introduction

1. This is an appeal against a decision of the LVT London Rent Assessment Panel dated the 22nd of December 2010. This matter arose as an application for a determination of liability to pay service and administration charges. The applicant, Mr Olajide Olaleye, is the leaseholder of 36 Culpepper Close, London. He holds under a lease for 125 years from the 1st June 2003. The appellant/respondent, OM Property Management Ltd, is the management company under the lease.

2. The applicant made a number of criticisms of the service and administration charges. The LVT rejected those points. The LVT pointed out that the lease required the tenant to pay the service charge six monthly in advance and the managing agents were a party to that lease. The service charges were found to be reasonable, as were the debt collection agency fees. No point arises on this appeal on any of those matters.

The LVT Decision

3. At paragraph 42 of their decision the LVT turned to "arrears letter charges" in these words:

"As regards the charges for reminder letters, whilst it is clear why the Respondent would want to levy these charges, it is less clear that it is entitled to do so under the Lease. Ms Khan referred the Tribunal to clause 4.1 of the Lease which requires the tenant to indemnify the landlord (for the mutual protection of the landlord and the managing agents) *"against all actions proceedings costs claims and demands in respect of any breach non-observance or non-performance [of its covenants]"*. However these charges do not represent real costs, and nor are they actions, proceedings, claims or demands (save in the circular sense that the Respondent is demanding them). They are simply penalty charges and in the Tribunal's view are not recoverable as a matter of construction of the Lease."

4. The 'Determination' of the Tribunal was, so far as relevant, as follows:

"44. The amounts disputed by the Applicant are payable in full except for: --

.....

six arrears letter charges (disallowed by Tribunal) £346 .55

45. The Applicant has applied for an order under section 20C of the 1985 act that none of the costs incurred by the Respondent in connection with these proceedings should be recoverable as service charge. In the Tribunal's view the Respondent has acted reasonably and behaved properly in connection with these proceedings, and it has been successful on nearly all of the disputed issues and therefore the Tribunal declines to make an order under

Section 20C limiting the proportion or amount of the Respondent's costs incurred in connection with these proceedings that are recoverable as service charge.

46. Nevertheless, there is a separate question to consider, namely whether the Respondent's costs are recoverable under the Lease. Ms Khan said that the costs incurred by the Respondent were in-house legal costs, i.e. the costs of preparing for and appearing at the Tribunal proceedings, and that the time spent by her was seven hours at a charge-out rate of £150 per hour. As regards recoverability under the Lease, Ms Khan relied on paragraph 15.3 of Part E of the Sixth Schedule which entitles the managing agents to charge to the leaseholders by way of service charge "... *any legal or other costs reasonably and properly incurred by the Manager and otherwise not recovered in taking or defending proceedings... arising out of... any claim by or against any... lessee or tenant...*", and at first sight this would seem to cover in-house legal costs.

47. However, the time spent by Ms Khan is not considered by the Tribunal to be a 'cost' in the sense envisaged by the Lease extract quoted above. Had the Respondent instructed an external solicitor and been billed for and paid for the time spent by that solicitor then this would have been a cost falling within the relevant provision of the Lease. However Ms Khan's charge out rate of £150 per hour is purely a notional charge and it is highly unlikely that it is equivalent to the actual cost to the Respondent. In any event, whilst in an economic sense there is arguably an opportunity cost of Ms Khan working on this case rather than on another case, the Respondent would (it is reasonable to assume) have been employing Ms Khan anyway and therefore the Tribunal does not accept that the time spent by Ms Khan on this case is a cost falling within the provision relied upon by Ms Khan. Accordingly, the Tribunal determines that the Respondent's notional in-house charges for the time spent by Ms Khan in connection with these proceedings are not recoverable under the Lease."

5. On the 10th of February 2011 the LVT refused permission to appeal. It sought to distinguish the authority (the Court of Appeal decision in *Re Eastwood* [1985] 1 Ch 112) brought to its attention in the application for permission. On the 6th of April 2011 the President of the Upper Tribunal (Lands Chamber) (hereafter referred to as "this Tribunal") granted permission to appeal, observing that there was a realistic prospect of success in relation both to the in-house legal costs and to the arrears letter charges. The appeal is by way of review and is conducted on the basis of the written representations of the appellant. Mr Olaley has not made any representations opposing the appeal.

Submissions

In-House Solicitor's Costs

6. The appellant submits that the LVT erred in law in paragraph 47 of its decision. It is trite law that there is no basis for differentiating between the costs of in-house solicitors and external solicitors. The appellant referred to the case of *Henderson v Merthyr Tydfil Urban District Council* [1900] 1 QB 434. This was an appeal against a refusal to allow the Council its costs incurred by an employed solicitor on a fixed annual salary.

Allowing the appeal Channell J said at page 437:

"... the registrar was wrong in disallowing the whole of the solicitor's profit costs. A certain part of the salary... was paid by the district council in respect of them, and that portion ought to have been allowed and paid by the opposite party. It must be assumed until the contrary is shown that [the annual salary] is a proper sum to be paid by the solicitor for his whole year's work, and also that[the costs claimed in these proceedings] was a proper sum to be paid to him for this part of his work... It seems to me that the registrar was clearly wrong in disallowing the whole of the amount charged by the solicitor in respect of work done by him, and, further, that unless something could be shown in which it is most improbable in this case can be shown, the whole ought to have been allowed..."

7. In the case of *Re Eastwood (deceased)* [1985] 1 Ch 112 the Court of Appeal had to consider the in-house costs of the Attorney General and the Treasury Solicitor. Russell LJ said (at 129G):

"The question of principle involved is whether the taxing Master correctly approached the problem of taxation of costs awarded to the Crown, having regard to the fact that the Crown was represented... not by an independent solicitor but by the Treasury Solicitor and his department. The question of principle would apply equally to the case of a local government authority, a nationalised industry such as British Rail, and any industrial concern conducting litigation through its own legal department of which all the expenses, including the salaries of the solicitors, assistant solicitors and legal executives, are paid by it, and not by instructing an independent solicitor or firm to act for it."

He continued (at page 132C):

"It is the proper method of taxation of a bill in a case of this sort to deal with it as though it were the bill of an independent solicitor, assessing accordingly the reasonable and fair amount ... having regard to all the circumstances of the case."

8. The appellant observes that this principle has been affirmed many times and instances the cases of *Maes Finance Ltd v W. G. Edwards & Partners* [2000] 2 Costs LR 198 and *Cole v British Telecommunications PLC* [2000] 2 Costs LR 310. The appellant further submits that this point was not raised by the respondent but taken by the LVT without any advance indication that it was an issue that the LVT required to be addressed. The appellant was not given a fair opportunity to deal with it, contrary to natural justice.

Arrears letter charges

9. The appellant submitted that the LVT gave no reasons for its conclusions that the letters in question were not within the terms of the lease and an unenforceable penalty charge. It was argued that the LVT was right to find that the debt collection agency fees were both within the terms of the lease and reasonable in their amount. It was difficult to see any significant conceptual difference between such fees and the arrears letters fees. In those circumstances it was incumbent on the LVT to explain why the arrears letters did not fall within the words of clause 4.1 of the lease as being "actions proceedings claims or demands".

Consideration and Conclusion

10. In my judgment the law, as set out in the appellant's submissions, is well established and clear. The case of *Re Eastwood (deceased)* [1985] 1 Ch 112 confirmed a principle which has long been recognised, namely that the costs of an in-house solicitor are to be dealt with on the same basis as if they were the costs of an independent solicitor. There is no proper basis for distinguishing that authority from the present case. As Channell J. made clear over a century ago, a body is entitled to employ a salaried solicitor to do its legal work, instead of always putting that work out to an independent solicitor, and is entitled in principle to recover sums in respect of the costs of the legal work that salaried solicitor has engaged in. The LVT itself remarked that had the appellant instructed an external solicitor the cost would have fallen within the relevant provision of the lease. In other words, the cost would have been "any legal or other costs reasonably and properly incurred by the Manager ... arising out of... any claim by or against any lessee or tenant .." under paragraph 15.3 of part E of the Sixth Schedule. The cases demonstrate that if that was true for an independent solicitor, as it was, it was also true for the in-house solicitor Ms Khan.

11. On this point the LVT erred in law. The LVT indicated that the costs in question were seven hours at a rate of £150 an hour, namely £1,050. There is no point in referring this matter back to the LVT. The appellant is entitled to charge £1,050 as legal costs in respect of Ms Khan's attendance.

Arrears letter charges

12. It is an important principle that the decision of the LVT must give adequate reasons. To be adequate those reasons must provide the parties with an understanding of why the LVT decided as it did. Of course the LVT does not need to spell out every little detail and is entitled to treat the parties as being informed about the facts and issues in the case. I regret to say that I do not think that the LVT's decision in paragraph 42 succeeds in giving adequate reasons. It is not clear to me why the charges do not represent real costs nor is it clear why they should be disqualified from being claims or demands within the terms of the lease simply because the claims or demands are made by the respondent who is, after all, the person that claims to be owed the money and demands it. I cannot understand from the decision why the LVT describes them as penalty charges. Either the landlord is entitled to recover them under the words of the lease or the landlord is not.

13. However, in this instance, I do not think it is open to this Tribunal to resolve the matter itself. There are no factual details of the terms, amount or nature of these letter charges before me or recorded in the decision. This Tribunal has not been provided with a copy of the lease and it seems to me that there is some scope for argument as to which part of clause 4.1, as quoted in the LVT decision, if any, the letter charges most appropriately fall under. So while the appeal succeeds, this issue must be remitted to the LVT for determination.

Dated: 3 May 2012

His Honour Judge Mole QC