

**THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL**



**SCHEDULE 11 COMMONHOLD AND LEASEHOLD
REFORM ACT 2002**

DECISION AND ORDER

Case Number: CHI/OOML/LAC/2007/003

Property: 4 Burton Villas, Hove, East Sussex BN3 6FN

Applicant: Mr M Pellant (the landlord)

Respondent: Mr P & Dr S West (the leaseholder)

Application Date: 8th October 2007

Tribunal: Mr R T A Wilson LLB (Lawyer)
Mr B Simms FRICS MCI Arb (Chartered Surveyor)

**Date of the
Tribunal's Decision:** 12th May 2008

SUMMARY OF DECISION

1. The Respondents are liable to make the following payments of administration charge to the Applicant:-
 - 1.1 The amount of Howlett Clarke solicitors fee note dated 24th August 2006 in the sum of £389.51 (less any sums already paid)

APPLICATION

2. This was an application made by Mr Pellant on the 8th October 2007 pursuant to Schedule 11 of the Commonhold and Leasehold Reform Act 2002 for a determination in respect of administration charges levied on the ground floor flat at 4 Burton Villas Hove, East Sussex..

BACKGROUND

3. Following a preliminary hearing of the matter on the 28th December 2007 and a Pre Trial Review on the 11th January 2008, directions were issued for the management of the case including that the matter would be determined without an oral hearing but on the basis of submissions submitted by the parties within a specified time frame. Both parties complied with the directions albeit not within the timetable and the Tribunal had the benefit of full statements on which to make a determination.
4. Another application concerning a breach of covenant by the leaseholder had been determined by a differently constituted Tribunal in May 2006 under case number CHI/OML/LBC/2006/002. This determination was not strictly relevant to this application but was part of the background context against which it was made.

JURISDICTION

5. The Tribunal has the power to determine whether an administration charge is payable in accordance with schedule 11 to the Commonhold and Leasehold Reform Act 2002 (the 2002 Act) which provides that

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

LEASE

6. The Tribunal had a copy of the lease relating to flat 4 dated the 28th February 1983 and is for a term of 99 years from the 25th December 1982 at a ground rent of £50 per annum payable in advance. The lease was varied by deed of variation dated 16th January 2004
7. So far as is relevant to the application, under clause 3 (16) the tenant covenants to pay to the landlord

'all expenses including solicitors costs and disbursements and surveyors fees incurred by the landlord incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 or incurred in or in contemplation of proceedings under sections 146 or 147 of that Act not withstanding in any such case forfeiture is avoided otherwise by relief granted by the court and to pay all expenses including solicitors costs and disbursements and surveyors fees incurred by the landlord of and incidental to the service of all notices and schedules relating to wants of repair of the building whether the same be served during or after the expiration or sooner determination of the term hereby granted'

ISSUES IN DISPUTE

8. The Tribunal identified the administration charges in dispute as the sum of five invoices as follows:-
 - a) Howlett Clarke solicitors fee note dated 7th February 2006 totalling £804.28
 - b) Howlett Clarke solicitors fee note dated 8th June 2006 totalling £847.76
 - c) Howlett Clarke solicitors fee note dated 24th August 2006 totalling 389.51
 - d) Counsel fee note dated 25th April 2007 totalling £987.00
 - e) Austin Gray surveyors fees of £176.25

9. The sums demanded related to solicitor's barrister's and surveyor's costs incurred by the landlord between February and August 2006 in investigating an alleged breach of covenant by the leaseholders. The central issue for the Tribunal was whether the West's were liable to pay all or any of these costs under the terms of their lease and, if so, whether the costs were reasonable in amount.

10. The scope of the application was whether the sums in question were payable as administration charges. The Tribunal was not required to determine whether they were payable as service charges or whether there had been a breach of the lease. There were no applications pursuant to section 27A of the Landlord & Tenant Act 1985 or section 168(4) of the 2002 Act.

DECISION

11. The Tribunal considered the written evidence and submissions and dealt with the liability to pay as the first issue and then the reasonableness of the charges.
 - A) Liability to pay administration charges.

12. It is settled law that a leaseholder is only liable for a landlords legal costs if there is an express term in the lease to this effect. If there is an express term the courts will interpret it narrowly and determine any uncertainties in the leaseholders favour and *contra proferentem* against the landlord. There is no general presumption, when construing a lease that it will have been intended for the landlord to recoup all of its expenditure. It is necessary to consider the precise wording of the lease terms in order to ascertain the extent of the tenant's liability. Clause 3.16 is, in the Tribunal's view, clear, unambiguous and narrowly drawn. The natural meaning of, '*costs incurred in or in contemplation of proceedings under section 146 or 147,*' is that it only applies when the landlord has formed a clear and demonstrable intention to pursue proceedings under Sections 146 or 147 of the LPA 1925. The natural meaning of '*incidental to the preparation and service of a notice under section 146 of the LPA 1925*' is

that it only applies when the landlord has formed a clear and demonstrable intention to serve a notice.

13. The Tribunal found that the express terms of section 3.16 of the lease did entitle the landlord to recover legal and surveyors charges but only if the same were incurred by the landlord in or in contemplation of proceedings under section 146 or 147 of the Law and Property Act 1925 or incurred incidental to the preparation and service of a notice under section 146 of the LPA 1925
14. When faced with the possible breach of covenant, the landlord can choose its course of action, but he can only recover all or part of his costs if the lease allows. In this particular case we find that the landlord is only able to recover his costs as administration charges in so far as they come within the ambit of clause 3.16 as construed in accordance with the principles set out above.
15. The first invoice submitted by Messrs Howlett and Clarke solicitors to the applicant contained in the Tribunal's bundle is that dated the 7th February 2006 for the amount of £804.28. The Tribunal considered that this account and the work carried out could not reasonably be taken as being incidental to or in contemplation of sections 146 or 147 (forfeiture) proceedings. Neither was the work clearly incidental to the preparation of a section 146 notice. The narrative of the account makes no reference to forfeiture proceedings or the service of a notice but refers to advice on the lawfulness of a proposal of the owners of the ground floor flat to build a workshop/shed in the garden and advice given on the diminution in value of the freehold. For these reasons the Tribunal found that this invoice did not fall within 3.16 of the lease so as to be recoverable as an administration charge.
16. The second invoice from Howlett Clarke is dated the 8th June 2006 and the amount due is £847.76. The narrative reads as follows:-

"To our professional charges in connection with the further conduct of enforcement action in respect of breach of lease by Mr & Mrs West including instruction Counsel to prepare a statement of case/ skeleton argument. Receiving and reviewing the same and submitting the same to the Tribunal and advising you thereof. Liaising with you as to the Tribunal's arrangements for conduct receiving the decision of the Tribunal and reporting to you thereon."

We do not consider that the work carried out by this invoice can properly or reasonably be considered as falling within the ambit of section 3.16. The narrative makes no reference to forfeiture proceedings or the service of a 146 notice but refers to work on preparing a statement of case to the Tribunal. The mere fact that an application to the Tribunal was contemplated does not in its self signify that the landlord necessarily intended to bring forfeiture proceedings. The remedies available to a landlord following a breach of covenant are not limited to forfeiture. They could for example consist of an application for an injunction or an application for specific performance or an action for damages. On the papers before us we do not consider that enough was done by the landlord to make it clear to the leaseholder that the action being taken by him, the landlord, was a prelude to forfeiture proceedings. Furthermore even if the

intention to take forfeiture proceedings had been properly communicated, we consider that it was not reasonable for the landlord to go to the expense of instructing Counsel to settle the proceedings to the Tribunal. For these reasons we find that the Respondents are not liable to pay an administration charge claimed by the Applicant in respect of this invoice

- 17 The third invoice submitted by Messrs Howlett Clarke is dated the 24th August 2006 and is for £389.51. The narrative of this invoice makes clear reference to serving a notice under section 146 of the Law and Property Act 1925 and we have no difficulty in finding that this invoice falls within the scope of clause 3.16 of the lease.
- 18 The fourth invoice is a fee note from Simon Sennett of Counsel dated the 25th April 2006 for £987.00. The fee note contains no narrative of the work carried out and merely states a description “ statement of case” and six hours having been spent. The Tribunal noted that the section 146 notice was served on the 19th July 2006 whilst the fee note relates to work carried out on the 18th April 2006 some three months earlier. The Tribunal found that the express terms of the lease did not entitle the landlord to recover the cost of Counsels fee as an administration charge. There was no evidence before it, which suggested that the brief to Counsel was a prelude to forfeiture proceedings. We suspect that Counsels fee note related to drafting the pleadings for the application to the Tribunal seeking a declaration that there was a breach of covenant. Whilst a section 146 notice cannot be served on leaseholder without a declaration of breach from the Tribunal, for the reasons stated above the existence of such an application is not in its self sufficient evidence of the landlord’s intention to take forfeiture proceedings.
- 19 The final invoice to be considered is that from Austin Gray surveyors dated the 6th February 2006 for the sum of £176.25. The narrative of this invoice reads, *‘inspection of property, considering potential claim for diminution in the value of property, discussing with Mr T Newey and issuing advice and recommendation’*. Bearing in mind the date of the invoice namely the 9th February 2006, some five months before service of the section 146 notice and the fact that the narrative makes no reference to such proceedings, the Tribunal found that the landlord was not entitled to recover this cost as an administration charge under the terms of the lease.

(B) Reasonableness of the costs

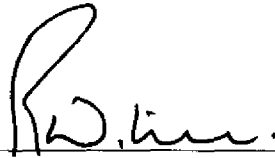
- 20 Having found that the landlord was only entitled to recover the cost of the third invoice from Howlett Clarke solicitors dated the 24th August 2006 in the sum of £389.51 the Tribunal went on to determine the reasonableness of those costs. In the view of the Tribunal the amount of costs in the sum of £331.50 exclusive of vat which included advising in respect of the alleged breach of the lease and drafting the section 146 notice was not unreasonable and in line with what the Tribunal would expect to find for a notice of this kind. The Tribunal considered that these legal costs were reasonable and therefore recoverable in full as an administration charge.

DETERMINATION

21 The Tribunal determines for the reasons set out above that the Respondents are liable to pay the administration charges as set out in the on the first page of this order.

Dated 12th May 2008

RTA Wilson (Chairman)

A handwritten signature in black ink, appearing to read 'R. Wilson', is written over a horizontal line. The signature is cursive and includes a period at the end.