11368

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/OOBQ/LAC/2015/0019**
Property	:	**West Wing, Alkrington Hall North, Middleton, Manchester M24 1WD**
Applicant	:	**Orhan Bicer**
Representative	:	**in person**
Respondent	:	**Elmdon Real Estate LLP**
Representative	:	**J.B. Leitch Limited**
Type of Application	:	**Application for a determination as to liability to pay and reasonableness of a variable administration charge under Schedule 11 of the Commonhold and Leasehold reform Act 2002 ("the Act")**
Tribunal Members	:	**Mr G. C. Freeman** **Ms J. Jacobs MRICS Expert Valuer Member**
Date of Decision	:	**20 January 2016**

DECISION

DECISION

None of the costs incurred by the Respondent incidental to the preparation and service of two notices dated 8th July 2015 and 25th September 2015 respectively, 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 or of proceedings on account of arrears of rent for forfeiture of the Lease of the property or for the recovery or attempted recovery of those arrears are payable by the Applicant.

The Application

1 By an application dated 28 September 2015 the Applicant, applied to the First-tier Tribunal Property Chamber (Residential Property) ("the Tribunal") under paragraph 5(1) of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 as amended ("the Act") for a determination of his liability to pay administration charges in connection with his tenancy of the West Wing, Alkrington Hall, Middleton, Manchester M24 1WD ("the Property").

2 By directions issued by a Procedural Chairman on 4th November 2015 the Tribunal directed that the application be dealt with on the basis of written representations without an oral hearing unless either or both parties requested an oral hearing. No such request was received, and the Tribunal accordingly met to determine the application on 20th January 2016. Statements of Case and written representations were received from both parties and were copied to each other.

Background

3 The Application arises out of the alleged non-payment of ground rent reserved by a Lease of the Property. The Applicant is the leasehold proprietor which he holds pursuant to a lease ("the Lease") dated 27th February 1996 made between J & R Pickup Limited of the one part and Hiretoken Limited of the other part. The Lease granted the term of 999 years from 28th June 1994 less the last ten days. The ground rent reserved and payable under the lease is £50.00 per annum. The Respondent is entitled to the reversion immediately expectant on the determination of the term created by the Lease.

4. From the papers submitted to the Tribunal it is evident that the Respondent has served forfeiture notices on the Applicant for non-payment of rent and seeks recovery of the legal costs of preparing and serving such notices. The lease has not yet been forfeited. No application for relief against forfeiture has been made.

5. On 14th January 2011 the Respondent wrote to the Applicant demanding eleven years' unpaid rent in the sum of £550. The Respondent then instructed a firm of solicitors in connection with the matter. Altermans, solicitors, served Notices on the Applicant under section 166 of the Act by letter dated 28 July 2011. These related to the years 29th September 2000 to 29th September 2011.

6. The Applicant paid the sum of £300 to Altermans by letter from his solicitors dated 17 November 2011. By their reply dated 21 November 2011, Altermans did not accept payment on the grounds that an administration charge for late payment had accrued and the landlord had incurred costs of £316.00. However, the amount paid was not returned.

7. On 7th January 2013, two section 166 Notices was served on the Applicant requiring payment of ground rent for the period 30th October 2011 to 29th October 2012 and 30th October 2012 to 29th October 2013 respectively. Accompanying the notice was a statement of account which showed a balance of £700 owing in respect of ground rent. No administration fees or late payment fees are shown due on this statement.

8. On 25 November 2013, a further section 166 Notice was served on the Applicant requiring payment of ground rent for the period 30th October 2013 to 29th October 2014.

9. On 1st November 2014, two section 166 Notices were served on the Applicant requiring payment of ground rent for the periods 30th October 2013 to 29th October 2014 and October 2014 to 29th October 2015 respectively. It will be noted that two notices had then been served in respect of the period 30th October 2013 to 29th October 2014, each specifying a different payment date (27th December 2013 and 3rd December 2014). All these notices, were served by the Respondent.

10. The Respondent then seems to have instructed its present solicitors to recover the sums due. A Notice Before Forfeiture Pursuant to Section 146(1) of the Law of Property Act 1925 (" s 146 Notice") was served on the Applicant dated 8th July 2015. The solicitors then appear to have been appraised of the payment of £300 referred to in paragraph 6 above which prompted a second s 146 Notice dated 25th September 2015.

The Lease

11. The relevant provisions of the lease are that it reserves a rent of £50 per year. This is payable during the Term . . . *"in equal half-yearly amounts in advance on the Rent Days in each year . . .*". However, on consulting the definition of "Rent Day" in the Lease, it states that it is *"29th September and in each year"*.

12. By clause 7.15 of the tenant covenants with the Landlord:-

"to pay 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 or of proceedings on account of arrears of rent for forfeiture of this Lease or for the recovery or attempted recovery of those arrears notwithstanding forfeiture is avoided otherwise than 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 the service of notices and schedules relating to defects . . . whether the notice be served during or after the expiration or sooner determination of the Term".

13. Clause 10 of the Lease provides that if the rent or part is at any time in arrear and unpaid (whether formally demanded or not) and provided notice has been given to any mortgagee of the lessee, the Landlord may re-enter and forfeit the Lease.

The Law

14. An "administration charge" is defined in paragraph 1(1) of Schedule 11 to the 2002 Act as:

"an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly-

(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease."

15. Paragraph 2 states that "A variable administration charge is payable only to the extent that the amount of the charge is reasonable. A "variable administration charge" means "an administration charge payable by a tenant which is neither – (a) specified in his lease, nor (b) calculated by reference to a formula in his lease" (paragraph 1(3)).

16. Paragraph 5(1) provides that "An application may be made to a First Tier Tribunal Property Chamber for a determination whether an administration charge is payable and, if it is, as to –

(a) the person by whom it is payable,
(b) the person to whom it is payable.
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the matter in which it is payable."

17. Sub-paragraphs (2) and (4) make it clear that the Tribunal has jurisdiction in this regard whether or not any payment has been made unless, inter alia, the matter has been agreed or admitted by the tenant.

18. Paragraph 4 of Schedule 11 provides:-

"4. (1) A demand for the payment of an administration charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to administration charges.

(2) The appropriate national authority may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.

(3) A tenant may withhold payment of an administration charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.

(4) Where a tenant withholds an administration charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period of which he so withholds it."

19. The Regulations referred to in paragraph 4 (2) are contained in the Administration Charges (Summary of Rights and Obligations) (England) Regulations 2007 (S.1.2007 No 1258) which came into force on 1 October 2007. These provide that a summary of rights and obligations must accompany a demand for service charges. Among other requirements, it is a requirement that a tenant must be informed of his right to apply to a First-tier Tribunal Property Chamber (Residential Property) for a determination of reasonableness and payment of administration charges.

20. As this application concerns the entitlement of a landlord to rely on a tenant's covenant to pay costs incurred in or in contemplation of any proceedings or the preparation of any notice under section 146 of the Law of Property Act 1925, it will be helpful to have the terms of that section in mind, together with other more recent statutory restrictions on the forfeiture of residential leases.

21. Section 146(1) provides that:

"A right of re-entry or forfeiture ... shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice –

(a) specifying the particular breach complained of;
(b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
(c) in any case, requiring the lessee to make compensation in money for the breach;

and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

22. Section 146 does not apply to all forfeitures. In particular section 146(11) provides that:

"This section does not, save as otherwise mentioned, affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent."

23. Additional statutory restrictions apply to the forfeiture of leases of residential premises. The first of these is contained in section 81 of the Housing Act 1996, and applies only to forfeiture for non-payment of service charges or administration charges. It provides:

"81(1) A landlord may not, in relation to premises let as a dwelling, exercise a right of re-entry or forfeiture for failure by a tenant to pay a service charge or administration charge unless –

(a) it is finally determined by (or on appeal from) a leasehold valuation tribunal or by a court, that the amount of the service charge or administration charge is payable by him, or

(b) the tenant has admitted that it is so payable."

24. Section 81(4A) makes it clear that the reference in this section to the exercise of a right of re-entry or forfeiture includes the service of a notice under section 146(1) of the 1925 Act.

25. Section 166(1) of the Act provides that a tenant under a long lease of a dwelling is not liable to make a payment of rent under the lease unless the Landlord has given him a notice relating to the payment; and the date on which he is liable to make the payment is that specified in the notice.

26. Section 166 further states as follows:

"(2) The notice must specify-

(a) the amount of the payment,
(b) the date on which the tenant is liable to make it, and
(c) if different from that date, the date on which he would have been liable to make it in accordance with the lease,

and shall contain any such further information as may be prescribed.

(3) ----

(4) ----

(5) The notice—

(a) must be in the prescribed form, and
(b) may be sent by post

(6) ----

(7) In this section "rent" does not include-

(a) a service charge (within the meaning of section 18(1) of the 1985 Act), or

(b) an administration charge (within the meaning of Part 1 of Schedule 11 of this Act"

27. The prescribed information referred to in s 166(2) is contained in the Landlord and Tenant (Notice of Rent) (England) Regulations 2004 (SI 2005/1355).

28. Section 167 of the Act, restricts the right of forfeiture for failure to pay small sums for a short period as follows:

"167(1) A landlord under a long lease of a dwelling may not exercise a right of re-entry or forfeiture for failure by a tenant to pay an amount consisting of rent, service charges or administration charges (or a combination of them) unless the unpaid amount –

(a) exceeds the prescribed sum, or
(b) consists of or includes an amount which has been payable for more than a prescribed period.

(2) The sum prescribed under sub-section (1)(a) must not exceed £500

(3) If the unpaid amount includes a default charge, it is to be treated for the purposes of sub-section (1)(a) as reduced by the amount of the charge; and for this purpose "default charge" means an administration

charge payable in respect of the tenant's failure to pay any part of the unpaid amount."

29. The Rights of Re-entry and Forfeiture (Prescribed Sum and Period)(England) Regulations 2004 (SI 2004/3086) state that the Prescribed Sum is £350. The Prescribed Period is three years.

30. Section 81 of the 1996 Act applies to forfeiture for failure to make payments of service charges or administration charges; section 167 of the 2002 Act relates additionally to forfeiture for non-payment of rent. Further protection for residential tenants against the service of a notice under section 146 is provided by section 168 of the 2002 Act, which applies to the service of such notices for breaches of other obligations. Section 168 originally provided as follows:

"168(1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless sub-section (2) is satisfied.

(2) This sub-section is satisfied if –

(a) It has been finally determined on an application under sub-section (4) that the breach has occurred;

(b) The tenant has admitted the breach, or

(c) A court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.

(4) A landlord under a long lease of a dwelling may make an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred."

31. The reference in section 168(4) to a leasehold valuation tribunal has been replaced, since 1 July 2013, with a reference to the "appropriate tribunal" which, in England, means the First-tier Tribunal (Property Chamber).

32. Section 169 contains supplementary provisions of which section 169(7) is relevant; it provides that:

"(7) Nothing in section 168 affects the service of a notice under section 146(1) of the Law of Property Act 1925 in respect of the failure to pay –

(a) a service charge (within the meaning of section 18(1) of the 1985 Act), or

(b) an administration charge (within the meaning of Part 1 of Schedule 11 to this Act).

The Applicant's Case

33. In an admirably concise statement, the Applicant stated that his present Landlord purchased the freehold in 2011. Without notice to him that they now owned the reversion to his lease, they wrote to him demanding arrears of rent in 2011. He seems to suggest that only six years rent is payable, for that is the amount he paid via his solicitors (paragraph 6 above). He also alleges the Notices referred to at paragraphs 7 to 9 inclusive are invalid, as a result of which the 146 Notices are invalid. He also seeks recovery of the costs incurred by his mortgagee, Halifax plc in the sum of £583.20 as a result of the costs incurred by Halifax plc presumably for legal advice in connection with the service of the s 146 Notices on them.

The Respondent's Case

34. The Landlord relies on the provisions of the lease and the clear contractual liability in the Lease to pay the landlord's costs of recovery of arrears of rent. They contend that the amounts claimed are administration charges. Helpfully the Respondent's solicitors provided a resumé of the relevant legislation and the cases relating to Landlord's recovery of costs.

35. The Respondent provided a breakdown of the charges involved in the work incidental to, or in contemplation of forfeiture at paragraph 22 of its statement and then proceeded to discuss cases involving the payment of costs. Some of these cases relate to recovery of sums due for service charges.

36. The Respondent must have realised its vulnerability on failure to serve appropriate notices under paragraph 4 of Schedule 11 of the Act, for it purported to correct the position by service of such notices by letter dated 11th December 2015. The Tribunal noted that this post-dated both s 146 Notices and the application to the Tribunal. The late service of such notice does not affect the outcome of the Tribunal's decision, except as to the question of whether the Respondent has acted reasonably in pursuing the matter, by service of the s 146 Notices.

Discussion

37. The Property is a dwelling for the purposes of the Act.

38. It was not disputed that the charge sought by the Respondent is an administration charge within the meaning of the Act. The Tribunal therefore has jurisdiction to consider whether the charges sought by the Respondent are reasonable.

39. The Tribunal noted the relevant legislation and case law kindly provided by the Respondent's solicitors, but noted that it does not deal comprehensively with the issues before the Tribunal. The relevant law is stated at paragraphs 14 to 32 above.

40. The Tribunal identified three issues for consideration. The first is the Landlord's ability to forfeit the lease for non-payment of rent. The second is the ability of the Landlord to forfeit the lease for a breach of a covenant other than to pay rent, that is, to pay the administration charges incidental to the service of a s 146 Notice. If such charges are payable as rent, at first blush there is no need for the Landlord to serve a s 146 Notice – see paragraph 22 above. The third issue concerns the payment of costs incurred in the Landlord's contemplation of service of s 146 Notices, and the recovery of costs incurred in the collection of the rent which are also payable by the tenant if forfeiture is avoided (by, for example, payment of the rent and costs due).

Non-Payment of Rent

41. It is not within the Tribunal's jurisdiction to consider whether the rent claimed, or part of it, is payable to the Landlord and the Tribunal makes no determination of such questions. However in considering whether the Applicant is liable to pay the costs incurred in recovery of the rent the Tribunal must have regard to the legislation which Parliament has enacted which now restricts the ability of the landlord to recover rent reserved by leases and the associated costs of recovery.

42. Section 166(1) precludes a Landlord from recovering rent unless a notice in the prescribed form has been served on the tenant. The notice must be in the form actually prescribed by the regulations, not in a form "to like effect", or containing the requisite information, as is sometimes found in legislation (section 2(2) of the Landlord and Tenant (Notice of Rent) (England) Regulations 2004 (SI 2005/1355)). The Tribunal considered that the effect of this requirement is that the notice must be correct in the sense that a recipient would know exactly what the notice requires in terms of rent due and the period for which it is due.

43. The Respondent seems to have been aware of the need to supply a notice, for it purported to serve notices under the Act on the Applicant, on various dates. (see paragraphs 5 to 9 inclusive). These notices all claimed that the rent under the lease was payable for a period from 30th October to 29th October, whereas the Lease provides for rent to be paid for a period from 29th September to 28th September in each year. In addition the notices stated "in accordance with the terms of your lease the amount of £50.00 is due on 30th October..." The Lease provides for payment on 29th September.

44. It seems that Messrs Altermans considered that such notices served prior to their involvement were invalid, for they arranged to serve further notices, copies of which were disclosed by the Applicant. These notices, all undated, but enclosed with their letter dated 28th July 2011, differ from the other notices in that they correctly state the periods when the rent is due. If that is the case, the Tribunal agree with Messrs Altermans opinion. The previous notices, and, for that matter, all subsequent notices, save for those served by Altermans, are incorrect. They fail to state correctly "the date on which [the tenant] would have been liable to make [the payment of rent] in accordance with the lease" (s166(2)(c) of the Act).

45. The Applicant then paid the sum of £300 to Altermans, thus reducing his liability at that time to £250. Altermans then made the mistake of rejecting this payment in their letter of 21st November 2011. As will be seen from paragraph (4) of Schedule 11 of the Act (paragraph 18 above), any demand for payment of an administration charge must be accompanied by a notice prescribed by the regulations made under the Act. No evidence has been forthcoming that any such notice was given. The demand for payment of these sums has not been included on subsequent statements from the Respondent. There is no application before this Tribunal specifically seeking payment of the sums demanded by Altermans so the Tribunal makes no decision on this aspect of the matter. It is, of course, open to either party to make such an application.

46. As at 21 November 2011 therefore, the most that can be said as owing in respect of rent was £250, which, it will be seen, is below the threshold of £350 prescribed by s 167(1) of the Act and the Rights of Re-entry and Forfeiture (Prescribed Sum and Period)(England) Regulations 2004 (SI 2004/3086) for the valid service of a s 146 Notice. (paragraphs 28 and 29 above).

47. The Tribunal then considered the recoverability of the arrears of rent which are alleged to have accrued since November 2011, taken together with the balance of £250 referred to above.

48. As will be seen from paragraph 44 above, the Tribunal has found that all the notices served on the Applicant, including those served after November 2011, are invalid, with the exception of the notices served by Altermans. It follows that by virtue of s 166, no rent has been payable for any period since 28th September 2011.

49. The Tribunal noted that the amount of rent which could have been properly claimed at the time the s 146 Notices were issued was below the threshold for issuing such Notices by virtue of s 167(1)(a). Accordingly the s 146 Notices dated 8th July 2015 and 25th September 2015 served on behalf of the Respondent were unlawful and of no effect.

Non-payment of the costs of and incidental to the recovery of rent as administration charges

50. It will be seen from paragraph 45 above that at the time Altermans demanded late payment fees and costs incurred by the Landlord, no notices were served, or indeed have since been served, until 11th December 2015, which comply with paragraph (4) of Schedule 11 of the Act. The Respondent's solicitors purported to correct the position by "retrospectively" serving such notice on 11th December 2015.

51. The Tribunal considered the effect of such retrospective demand. A demand for the payment of an administration charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to administration charges.

52. They concluded that the letter dated 11th December 2015 from the Respondent's solicitors complied with the Act. The demand seeking payment was accompanied by the statutory notice.

53. However, it follows that at the time they were issued, both of the s 146 Notices given in respect of the breach of covenant other than to pay rent were unlawful. Fortunately the Tribunal did not have to decide the point whether a subsequent notice in the letter of 11th December 2015, issued after the date of the Notices, had the retrospective effect of making them lawful. They were unlawful by virtue of non-compliance with s 166(1) and by virtue of s 167(1).

54. The Respondent is also caught by sections 81(1) and 81(4A) of the Housing Act 1996. No application to a First-tier Tribunal by the Respondent appears to have been made under section 81(1), as the Respondent appears to admit in its letter of 11 December 2015.

Costs incurred incidental to or in contemplation of proceedings for recovery.

55. The Tribunal concluded that, properly advised in the circumstances, no reasonable landlord would have contemplated forfeiture proceedings. The Respondent has adduced no other evidence of contemplation of proceedings for recovery, other than the s 146 Notices. It follows that the associated costs incurred by the Landlord in preparing and issuing the Notices are irrecoverable from the Applicant and the Tribunal so orders.

56. The Applicant has made an application for the costs he has incurred in connection with the Notices be paid by the Respondent. Those costs include the sum of £583.20, which the Applicant alleges he has been required to pay to his mortgagee in respect of solicitor's advice given to the mortgagee in connection with this matter. The Tribunal has power to order the repayment of the Application fee to the paying party. The Respondent has also applied, in paragraph 27 of its statement, for its costs of the Application to be paid by the Applicant.

57. The Tribunal makes no order on such costs or the repayment of the application fee and directs the Applicant, if he so wishes, to make a written application to the Tribunal for such an order, supported by a statement stating:-

57.1 The grounds for the Tribunal's jurisdiction to make such an order for costs (other than the application fee).

57.2 Evidence that the Applicant has incurred the costs claimed (excluding the Application fee).

58. A copy of any such application is to be served on the Respondent with the supporting statement. The Respondent is at liberty to supply a written statement, commenting on the application, within 21 days of receipt of the same, failing which the Tribunal will make a written decision on both applications.