

12049



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case reference** : **LON/00AH/LSC/2016/0352**

**Property** : **Flat B, Summervale, Queen Mary Road, Upper Norwood, London SE19 3NW**

**Applicant** : **Ground Rents (Regis) Limited**

**Representative** : **J B Leitch Ltd**

**Respondent** : **Mr Christopher Errol Gibson  
Mrs Soroya Gibson**

**Representative** : **Mrs Gibson in person**

**Type of application** : **For the determination of the reasonableness of and the liability to pay a service charge**

**Tribunal members** : **Judge O'Sullivan  
Mr Mason FRICS**

**Venue** : **10 Alfred Place, London WC1E 7LR**

**Date of decision** : **12 December 2016**

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**DECISION**

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### **Decisions of the tribunal**

- (1) The tribunal makes the determinations as set out under the various headings in this Decision
- (2) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.
- (3) Since the tribunal has no jurisdiction over ground rent, county court costs and fees, this matter should now be referred back to the Woolwich County Court.

### **The application**

1. This matter commenced in the Liverpool County Court under claim number C30LV302 and was transferred to the Woolwich County Court by order dated 7 July 2016. It was then transferred to this tribunal by the order of Deputy District Judge Perry dated 26 September 2016.
2. The Applicant seeks a declaration under section 168(4) of the Commonhold and Leasehold Reform Act 2002 in respect of alleged breaches of covenant and a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of service charges and administration charges payable by the Respondents.
3. The Second Respondent has in correspondence confirmed that the claim for the insurance charges is not disputed. The tribunal does not therefore have jurisdiction in this regard.
4. Likewise the tribunal does not have jurisdiction for the claim in relation to the ground rent (which is in any event admitted), court costs or statutory interest. These matters will be remitted to the county court after the tribunal has made its determination.
5. The relevant legal provisions are set out in the Appendix to this decision.

### **The hearing**

1. The Applicant was represented by Mr Beresford of Counsel at the hearing and Mrs Gibson appeared in person.

## **The background**

2. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.
3. The Respondents hold a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

## **The issues**

4. At the start of the hearing the tribunal identified the relevant issues for determination.
5. The proceedings contained a claim for the costs of insurance, ground rent, various administration fees and County Court costs. The claims for ground rent and county court costs do not fall within the tribunal's jurisdiction and will be remitted to the County Court.
6. The Second Respondent made a witness statement in which she confirmed that the cost of the insurance was not challenged. She also confirmed that the insurance administration fees charged by way of an administration fee in the sum of £11.94 and £19.99 respectively were also not challenged. It was confirmed however that the various administration charges claimed were challenged as was the claim seeking a declaration under section 168(4) of the Commonhold and Leasehold Reform Act 2002 Act that a breach of covenant had occurred. At the commencement of the hearing the Second Respondent confirmed that she would in fact like to challenge the insurance admin fees as she had not properly understood what they were.
7. The Applicant had filed a bundle of documents. This contained the witness statement of Mrs Gibson dated 1 July 2016 upon which she relied. The Applicant principally relied on the witness statement of Stuart Miles, a solicitor of J B Leitch solicitors. It had also filed a statement of case and a supplementary statement.

## **The alleged breach of covenant**

8. The Applicant seeks a declaration that the Respondents are in breach of covenant. The Applicant deals with this matter briefly in its statement of case. It says simply that it should be awarded a determination that the Respondents are in breach of the Lease as it is clear that the Respondents covenanted to insure the property in the joint names of the Applicant and the Respondents and have simply not done so. For the Applicant Counsel relied on *Vine Housing Co-Operative Ltd v*

*Mark Smith [2015] UKUT 0501 LC* which he says is authority that when assessing breaches of covenant the tribunals should look at the breach and simply decide whether as a matter of fact there has been a failure to comply with a covenant and that any surrounding facts are irrelevant.

9. Mrs Gibson disputed that there had been a breach of covenant. She informed the tribunal that when the landlord acquired the property in 2011 Pier Management took over the management. From that date onwards she submitted that she had automatically received service charge demands for insurance and that the landlord had automatically insured without any reference to her. On questioning her evidence was that at no time had the landlord written to suggest that she should be insuring or that she was in breach of covenant until May 2016.
10. Mrs Gibson's defence to the claim had not been included in her witness statement. The tribunal gave Counsel two adjournments to try and obtain instructions on the history to the insurance given it noted from the proceedings that insurance had been charged from 2011 onwards. It also appeared from the correspondence to be the case that the property was insured on a block policy. When the landlord had written to Mrs Gibson earlier this year she explained that she had immediately taken out insurance to cover the property.

#### **Alleged breach of covenant – the tribunal's decision**

11. The tribunal was not satisfied on the evidence that any breach of covenant has occurred.
12. The tribunal's jurisdiction is found in Section 168(4) which provides that;  
  
*"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 covenant or condition in the lease has occurred."*
13. The burden of proof lies on the landlord who must prove the facts alleged.
14. The landlord relies on clause 2(13) of the Lease which provides as follows;  
  
*"At all times during the said term to keep all buildings for the time being on the demised premises insured against loss or damage by fire flood or storm tempest burglary and aircraft and articles dropped herefrom and (during such time as the United Kingdom may be at war with any foreign power and so long as such risks shall be insurable) by acts or by on account of the Queen's enemies and such other risks*

*as the Lessor may specify in the joint names of the Lessor and the Lessee without the addition of other names in the Eagle Star Insurance Company Limited in the Lessor's agency in the full value of the costs of rebuilding thereof and also Architect's and Surveyor's fees in connection with such rebuilding and will pay all premiums necessary for that purpose within seven days after the same shall become due and whenever required to do so will produce to the Lessor the Policy of such insurance and the receipt for the premium payable in respect thereof for the current year".*

15. The three breaches complained of as set out in the application form (although not considered separately in the evidence) were that;
  - (a) The Respondents failed to enter into an insurance policy through an insurance company named by the Applicant;
  - (b) The Respondents failed to provide to the Applicant or Applicant's agent a copy of the insurance policy and/or receipt for the last premium of insurance when requested to do so; and
  - (c) The Respondents failed to insure the property in the joint names of the Applicant and Respondent.
  
16. The tribunal acknowledged that Mrs Gibson had raised her defence to this aspect of the application very late in the day. However the tribunal considered it must take it into account as it was relevant to the issue. Counsel was given two opportunities to try and take instructions but was unsuccessful. The tribunal found it surprising that the managing agents were not able to provide any information given they have been the managing agents over the relevant period.
  
17. The landlord had failed to explain the historic position on the insurance. From the information provided it appeared that the landlord had not raised the issue of the alleged breach of covenant in relation to insurance until 2016. From the evidence before us we were satisfied that the landlord had demanded insurance from 2011 although we had no evidence as to the circumstances in which it had been demanded. We did not, as would be expected, have any correspondence to evidence that copies of the policy had in the past been requested and that the landlord had insured in default of the tenant's failure. We were also concerned at the weight which we could give to the landlord's evidence. The landlord relied on the witness statement of Stuart Miles. A solicitor. His evidence appeared to report information told to him by the management company rather than coming from any direct knowledge. The tribunal would have found it helpful to have evidence from a property manager with direct knowledge.

18. As far as the alleged breaches are concerned the first allegation must fail as the insurance company named in the lease is no longer believed to be in existence. As far as the second allegation is concerned we have no direct evidence that a copy of the insurance policy was ever requested. Finally as far as all three allegations are concerned we faced some difficulty given the quality of the evidence before us. However given the surrounding circumstances in which insurance has been demanded for 5 years, the fact that insurance appears to have been arranged by the landlord immediately on its purchase in October 2011, the application for a breach of covenant not having been made until 2016 and taking into account Mrs Gibson's evidence it appears to us that the landlord is in any event estopped from claiming that a breach of covenant has taken place. We rejected the Applicant's suggestion that we should rely on *Vine Housing Co-Operative Ltd v Mark Smith [2015] UKUT 0501 LC* as in that case there was no suggestion that any estoppel arose and the facts of the cases are dissimilar. In any event we consider it somewhat telling that the Applicant relies on this case to urge us to declare a breach of covenant and that "*any surrounding circumstances are irrelevant*".

### **The administration charges**

19. The administration charges in issue and claimed by the Applicant are set out in the Applicant's statement of case and are considered in detail below.

### **The Applicant's case**

20. The Applicant relies on clause 2(21) of the lease pursuant to which the lessee covenants;

*"To pay unto the Lessor all costs charges and expenses (including legal costs and fees payable to a Surveyor) which may be incurred by the Lessor in or in contemplation of any proceedings under Section 146 and 147 of the Law of Property Act 1925"*.

21. Counsel for the Applicant submitted as a general point that costs under this section were not limited to legal costs as there is an express reference to surveyors' fees. Prima facie he submitted that the landlord was entitled to recover its administration charges. He accepted however that this clause did not operate as a standard indemnity provision but that the landlord was entitled to recover its costs where it was "*contemplating proceedings under section 146*".
22. As far as the individual categories are concerned the tribunal heard as follows by reference to the Applicant's supplemental statement;

- (a) Insurance administration fees – these were said to be in respect of arranging and administering the insurance policy
- (b) Arrears charges – each of these were said to be incurred when a chasing letter was sent
- (c) Land Registry fee – this was a fee for checking the registered address
- (d) Visitation charge and Disbursement charge – these were said to be incurred for the Applicant's field agent attending the premises to include preparing the notices and attending
- (e) Payment plan fee – this was said to be a fee for agreeing an instalment plan
- (f) Fee for referral to Mortgage Company - this fee was incurred in relation to approaching the lender to prepare the account and papers
- (g) Solicitors fee – this fee is said to be in respect of preparing the account to be referred to the solicitor.

### **The Respondent's case**

23. Mrs Gibson submitted simply that she challenged the charges and whether they could be recovered and whether they were reasonable. She relied on her witness statement.

### **Administration charges - The tribunal's decision**

24. All of the administration charges were disallowed.
25. The evidence before the tribunal was again limited to the witness statement of Mr Miles and the same comments apply. We had no evidence in respect of the landlord's intention to forfeit such as instructions to the agent or company board minutes or resolutions. We had no explanation of why the arrears had been allowed to accrue over a period of 5 years and why it was said that the landlord had an intention to forfeit over the entire period. Doing the best he could Counsel referred us to the some single items of correspondence in which a reference to possible forfeiture could be seen. These appeared to us to be generic template letters, at times apparently printed off with the name and property details inserted. As far as the charges themselves were concerned no attempt had been made by the Applicant to identify how the charges had been computed. There was no

breakdown of the time spent, seniority of the person responsible or rate applied. The evidence was highly unsatisfactory.

26. Turning to the individual charges themselves we found as follows;

- (a) An insurance administration fee dated 10 October 2011 in the sum of £11.94 – this is disallowed as we do not consider it falls within clause 2(21) and in view of our findings in relation to the breach of covenant claim.
- (b) An arrears charge dated 17 August 2012 in the sum of £75 – this is disallowed as we were not satisfied that the charge was incurred in contemplation or forfeiture. Proceedings for a breach of covenant and for a judgment in respect of arrears were not issued until June 2016. We have no real evidence that there was any intention to forfeit the lease at this time. In any event the charge is considered unreasonable given it seems to relate to a chasing letter for arrears which appears to be a template.
- (c) An insurance administration fee dated 10 October 2012 in the sum of £11.94 – disallowed please see above.
- (d) An arrears fee dated 22 October 2012 in the sum of £100 – disallowed please see above.
- (e) A Land registry fee dated 30 November 2012 in the sum of £16.00 – this is disallowed as we had no evidence that it fell within clause 2(21).
- (f) An arrears charge dated 12 July 2013 in the sum of £100 – disallowed please see above.
- (g) An insurance administration fee dated 10 October 2013 in the sum of £19.99 - disallowed please see above.
- (h) An arrears charge dated 18 October 2013 in the sum of £100 – disallowed please see above.
- (i) An insurance administration fee dated 10 October 2014 in the sum of £19.99 - disallowed please see above.
- (j) A visitation charge dated 2 September 2014 2 September 2014 in the sum of £100 and



- (k) A disbursement charge dated 2 September 2014 in the sum of £60 – both the visitation and disbursement charge are disallowed. These do not fall within clause 2(21) given proceedings were not issued until 2 years later and we have no evidence as to the intention to forfeit at this time. These appear to relate to a visit to the property to post a template arrears chaser on the door which appeared to be a photocopy with a name and address inserted in manuscript. No explanation was provided and no attempt was made to send correspondence by a signed for service. In any event the charges are considered unreasonable.
- (l) An arrears charge dated 13 March 2015 in the sum of £100 – disallowed please see above.
- (m) An insurance administration fee dated 10 October 2015 in the sum of £19.99 - disallowed please see above.
- (n) A disbursement fee dated 25 August 2015 in the sum of £60 and a visitation fee dated 28 August 2015 in the sum of £100 – disallowed on the same basis as above.
- (o) A fee for a referral to Mortgage Company dated 22 September 2015 in the sum of £250 - disallowed. There is no evidence these costs were incurred in contemplation of forfeiture so as to fall within clause 2(21). In any event we have no breakdown or explanation and these appear unreasonable.
27. We would mention that had we had evidence from the property manager at Pier Management we may have reached some different decisions. We are however bound to rely on the evidence before us which as mentioned above was extremely poor. We are grateful however for Counsel's assistance who did his best to assist the tribunal in the face of poor evidence.
28. We would also wish to point out that we found some of the correspondence to the leaseholder from Pier Management to be misleading and potentially intimidatory in its content. An example of this is a letter dated 11 November 2015 in which it is stated the property is "*currently eligible for forfeiture* " and that the landlord does "*not need a determination on this balance to exercise our (sic) right of re-entry*". This is not only misleading but intimidating in tone. Another example is the practice of affixing arrears letters in an open format on the leaseholder's front door for anyone to see. Pier Management may wish to review its practices in this area.

## **Application under s.20C**

29. At the hearing, the Respondent applied for an order under section 20C of the 1985 Act. Taking into account the determinations above, the tribunal determines for the avoidance of doubt, that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Applicant may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.
30. The tribunal has no jurisdiction over ground rent or county court costs. This matter should now be returned to the Woolwich County Court. The Applicant must produce a copy of this decision to the County Court in the papers in relation to its application for costs.

**Name:** S O'Sullivan

**Date:** 12 December 2016

### **Rights of appeal**

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

## **Appendix of relevant legislation**

### **Landlord and Tenant Act 1985 (as amended)**

#### **Section 27A**

- (1) An application may be made to the appropriate tribunal for a determination whether a service 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 manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
  - (a) the person by whom it would be payable,
  - (b) the person to whom it would be payable,
  - (c) the amount which would be payable,
  - (d) the date at or by which it would be payable, and
  - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
  - (a) has been agreed or admitted by the tenant,
  - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  - (c) has been the subject of determination by a court, or
  - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

#### **Section 20C**

- (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

- (2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
  - (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
  - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
  - (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
  - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

## **Commonhold and Leasehold Reform Act 2002**

### **Schedule 11, paragraph 1**

- (1) In this Part of this Schedule “administration charge” means 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.
- (2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.
- (3) In this Part of this Schedule “variable administration charge” means an administration charge payable by a tenant which is neither—
- (a) specified in his lease, nor
  - (b) calculated in accordance with a formula specified in his lease.

- (4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

**Schedule 11, paragraph 5**

- (1) An application may be made to the appropriate tribunal 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 manner in which it is payable.
- (2) Sub-paragraph (1) applies whether or not any payment has been made.
- (3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
- (4) No application under sub-paragraph (1) may be made in respect of a matter which—
- (a) has been agreed or admitted by the tenant,
  - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  - (c) has been the subject of determination by a court, or
  - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.
- (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
- (a) in a particular manner, or
  - (b) on particular evidence,
- of any question which may be the subject matter of an application under sub-paragraph (1).