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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00BN/LAC/2015/0014**
Property	:	**7 Hollyhedge Heights, Gatley, Manchester, M22 4EE**
Applicant	:	**Mr John Joyce**
Respondent	:	**Wallace Estates Limited**
Respondent's Solicitors		**Stevenson's Solicitors**
Type of Application	:	**Commonhold and Leasehold Reform Act 2002 Schedule 11 paragraph 5** **Landlord and Tenant Act 1985 Section 20C**
Tribunal Members	:	**Mr John Murray, LLB** **Mrs Anita Franks, FRICS**
Date of Decision	:	**23 February 2016**

DECISION

DETERMINATION

The Tribunal determines that the administration charges of £308 sought by the Respondent from the Applicant are not payable under s5(1) Commonhold and Leasehold Reform Act 2002.

INTRODUCTION

1. The Applicant made an application on 5 August 2015 under paragraph 5, Schedule 11 Commonhold and Leasehold Reform Act 2002 in relation to his liability to pay administration charges of £308 sought by the Respondent under his lease of 7 Holly Hedge Heights ("the Property"). An application was made under s20C Landlord and Tenant Act 1985 that the costs of the proceedings should not be added to the Applicant's service charge.

2. The Respondent has been the Freeholder of the Property since 1 May 2014 although it had been owned by an associated company since 23 December 2009. Simarc Property Management Limited had been the Managing Agents responsible for collecting rent since 23 December 2009, for both the Respondent and it's associated predecessor.

THE PROCEEDINGS

3. Directions were made by a Tribunal Judge on 13 August 2015.

4. The Applicant was required to file and serve within 21 days of the Directions, a bundle of documents including:

   (a) a copy of the application and these directions
   (b) a statement of case
   (c) the lease
   (d) any other relevant document relied upon.

5. The Respondent was required to respond within 21 days of receipt of the Applicant's bundle of documents

   (a) Any comments in respect of the Applicant's case
   (b) Copies of all demands and invoices relevant to the disputed charge
   (c) Details of the relevant clause(s) in the lease that the charges are alleged to be payable under
   (d) Any other relevant documents relied upon.

6. Provision was made for the Applicant to respond to the objections within fourteen days.

7. A hearing was arranged for the 5 February 2016 at 10.00am at the Tribunal office, 1st Floor, Piccadilly Exchange, 2 Piccadilly Plaza, Manchester M1 4AH.

THE LEASE

8. The Property is held on a 150 year lease dated 9th May 2005. The lease was originally held between Internet Property Development Limited, Proweb Limited, Contour Property Services Limited, and the Lessee at the time of purchase Ebenezer Abiodum, who subsequently transferred the Property to the Applicant on the 21 March 2006.

9. Ground rent is payable by the Lessee to the Freeholder in two equal payment in advance on the 1 January and the 1 July each year. When the lease was commenced it was set at £150 per annum, but by a mechanism in clause 9 of the lease it would be adjusted on each of the Review dates (the tent anniversary and every ten years thereafter) by reference to any change in the Index (currently the retail price index.) The Applicant accepts that the Respondent was entitled to raise the rent in 2015. Ground rent is currently £200 per annum.

10. Clause 13 of the Third Schedule to the Lease obliges the Applicant to indemnify and keep indemnified the Company the Developer and the Management Company against all damages costs and any other liabilities resulting from any non-observance or non -performance by the Buyer or his tenant or licensee or any other person at any other time occupying the Property of any convents relation to the Property herein contained or on the registers of the title above referred to.

11. Paragraph 2 of the Seventh Schedule applies the provisions of s196 Law of Property Act 1925 to the lease. s196(2)of the Act provides that notices might be sufficiently served if left at the last known place of abode or business in the United Kingdom of the person to be served, or affixed to the land house, or building of the lease. A notice might also be served by post or registered letter to the last know place of abode or business.

THE LEGISLATION : SCHEDULE 11 PARAGRAPH 5 COMMONHOLD AND LEASEHOLD REFORM ACT 2002

12. Liability to pay administration charges

5(1) An application may be made to a [leasehold valuation 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 payment has been made

(3) The jurisdiction conferred on a leasehold valuation 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).

APPLICATION UNDER S20c LANDLORD AND TENANT ACT 1985

THE HEARING

13. The Applicant attended in person, accompanied by his friend Sarah Joanne Lewis. The Respondent Company was represented by Mr. Stevenson, Solicitor. He was accompanied Ms Andrea Williams, Operations Manager for managing agents Simarc Property Management Ltd, (Simarc) who attended to give evidence.

14. The Applicant accepted at the outset that he owed Ground Rent of £500, but did not accept that he owed interest on outstanding payments. These were not matters the Tribunal has jurisdiction to determine. The Parties agreed that the issues to be determined by the Tribunal were:

a. Whether the Applicant had been properly served with notices that ground rent was due, in accordance with s166(1) Commonhold and Leasehold Reform Act 2002; and

b. if the Applicant had been so served, whether the administration charges were payable, in accordance with Schedule 11, Paragraph 5 of the same Act

THE EVIDENCE AND SUBMISSIONS

THE APPLICANT'S SUBMISSIONS AND EVIDENCE

15. In his written submissions the Applicant had stated that the last ground rent bill he received from Simarc was in June of 2012. He said it was delivered by post, and he paid it immediately to Simarc over the telephone. He said he had then heard nothing until the 1 June 2015, when he received a demand via his mortgagee for £821.20 for unpaid ground rent and administration charges. On making enquiries he was told that invoices had been sent to an email address, which he said was his ex girlfriend's email address.

16. The Applicant denied that he had ever provided the Claimant with an email address to be used as a billing address. His only explanation was that he may have provided it to the Freeholder when he bought the apartment, but was not given to the Managing Agents, Simarc. Ms Lewis told the Tribunal it was an address that she had not used since 2006. She was certain of this, as she had qualified as a personal trainer in that year, and had used an address set up for that business as her email address.

17. The Applicant said that he offered to pay the ground rent but it was refused, and he was told they would only accept £821.20. The correspondence submitted in evidence supported this.

18. He said that he historically would pay his ground rent to solicitors based in Tipton instructed by the previous freeholders. He said that he had received subsequent demands, in 2010 and 2012, by post, and had paid them over the telephone to the Respondent's payments team. He had not retained copies of them, as he was satisfied that they were paid off, as he had his credit card statement He was adamant that he had never set up an online account, did not have a computer, and had only recently got a smart phone. He said that he did not pay the bills himself.

19. Sarah Lewis told the Tribunal that she was not in the habit of allowing Mr Joyce to use her email address, although she had in the past as he did not use computers. She confirmed that when the Applicant purchased the flat they, were in a relationship, but they had never cohabited. They remained friends, and consequently wanted to assist him in 2015 when he received demands on the back of emails allegedly sent to her account. She said that she had not used the account since around 2006, when she became a personal trainer, and set up a different account.

20. The Applicant produced to the Tribunal a statement from his Santander credit card account, showing two card payments made to the Respondent on the 26 June 2012, for £321 and £75 respectively. The entries did not state how the payments were made, whether by online transaction or a telephone call, but they were clearly not made by cheque.

21. His submissions in relation to the level of administration costs were that they were "astronomical" but he did not make further submissions as to particular aspects of the charges.

THE RESPONDENT'S SUBMISSIONS

22. The Respondent filed a bundle of documents with a statement of case signed by their solicitor Mr Stevenson, of Stevensons Solicitors. Mr Stevenson confirmed that the Respondent had been Freeholder since 1 May 2014. Prior to that an associated company, Spenrent Ltd had been Freeholder since 23 December 2009. Simarc Property Management Limited had been the Managing Agents (for both Freeholders) since 23 December 2009.

23. The Respondent sought administration charges incurred in connection with the collection of ground rent from the Applicant. The administration charges were broken down as follows:

i. Letter £15
ii. Office Copy Entries £25
iii. Arrears File Preparation £110
iv. Informing Mortgage Company of Arrears £100
v. VAT £50
vi. Land Registry Fee £8

Total £308.

24. A statement dated 8 February 2016 by Andrea Williams, Operations Manager for the Lettings Agent Simarc was filed and served by the Respondents, some time after directions had concluded. The Tribunal had to determine whether to allow this statement given the Applicant had very little time to consider it. The Applicant did not object to it, and on the basis his submissions had been delivered to the Respondent late and the statement did not differ much from the Respondent's initial submissions, the statement was accepted in evidence by the Tribunal.

25. The Respondent submitted that all their correspondence to the Applicant since 12 June 2010 was sent by email only. They submitted that the Applicant (or somebody acting with his authority) had set up a web account with Simarc Property Management Limited on 10 June 2010. They produced in their evidence a Screen Print of the website portal for an application for an online account in use at that time. Their case was that the account could only be set up by the Applicant, or someone acting on his behalf. If an account was set up, he would be bound by the terms and conditions; which included an acceptance to accept service of notices by email. They said that the demands had not been sent by post as well, as this was not their practice.

26. The Screen Print entered with the submissions was blank in so far as it held no personal details of any lessee. The Respondent submitted that the website would oblige applicants to set up a Password with a minimum of 7 characters. The conditions state that "all your rent demands will be sent by email, which is is our primary point of contact with you". They asserted that in accepting this, the Applicant agreed to accept rent Demands by email only. They submitted that the Applicant could only set up the on line account by ticking a box accepting terms and conditions as stated. They submitted that no postal demands had been sent to the Applicant or to the property for ground rent, and that all payments made since the account was set up on 10 June 2010 had been made via the Respondent's online account.

27. Ms Williams said that the first payment of £150 was paid on 10th June 2010, through the online system, the day the account was set up.

28. She then indicated that £171 was paid on 26th June 2012 being £75 due on 1 January 2011 plus £96 arrears fee, and this was paid via the online banking system.

29. She stated that £225 was paid on 29 June 2012, being £75 due on 1 July 2011 and £75 due on 1 January 2012 and £75 due on 1 July 2012. She said that the Respondent's records showed that this amount was paid by cheque. This contradicted the documentary evidence supplied by the Applicant which confirmed that payment of £396 had been paid by card, on the 26 June 2012, in two payments of £371 and £75, not of £171 and £225.

30. A short adjournment was arranged so that Ms Williams could speak with her accounts department. It was confirmed that the payment had been recorded as received by cheque as a human error, and must have been paid over the telephone, rather than online - in accordance with the Applicant's evidence.

31. A total of £500 ground rent was outstanding being £150 for 2013, £150 for 2014, and £200 for 2015.

32. The Respondent submitted that in 2010, a person with the authority of the Applicant opened the online account. In their view there was clear evidence that it happened, because he was named on the system, rent had been received in 2012, one of those payments was made on line, and therefore a person must have been sending emails on the Applicant's behalf, and if that was the case, the Applicant would be bound by the actions of his agent.

33. The Respondent stated that none of the emails "bounced back" and consequently they must have been delivered to the email address. Delivery would not of course prove that they were seen, or that the terms of the lease had been altered.

34. In response to questioning by the Tribunal, Ms Williams stated that when the Applicant did not pay his ground rent, Simarc, they did not do anything other than send email reminders and contact the mortgagee. They did not send him mail, or telephone him.

35. Ms Williams stated that it was not credible that a demand would have been sent out by post as well as email, and that the Applicant must have had (and used) an online account or he would not have known about the amount of rent being due. Rent demands were sent by post until the email address was registered, when the account was set up in June 2010. Records prior to the system being amended, did you not have an email address with his phone number and everything.

THE DETERMINATION

36. The Tribunal has jurisdiction to consider the payability of administration charges. The Applicant challenges the Respondent as to their right to charge administration charges in circumstances when he maintains he was not in reach.

37. By s166(1) Commonhold and Leasehold Reform Act 2002 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 specified in that notice. The notice must be in the form prescribed by Regulations (s166(4)).

38. By virtue of Paragraph 4(1) of Schedule 11 to the 2002 Act, a demand for payment of administration charges must be accompanied by a summary of rights and obligations, in a form prescribed by relation (the Administration Charges (Summary of Rights and Obligations)(England) Regulations 2007; a tenant may withhold payment of administration charges until such a notice has been served.

39. It follows (and it was accepted by both Parties) that if the Respondent has not served Notices under s166 of the Act, the ground rent is due, and if the ground rent is not due, the Respondent cannot charge administration charges for collection of rent that was not due, or pursuing the Applicant for a non existent breach of lease.

40. The lease provides for service of notices in accordance with s196 Law of Property Act 1925. Service of notices by email was understandably not anticipated by the Parliamentary Draftsmen of 1925; it is possible of course for the parties to come to agreement about a different method for service of notices outside of the lease, and it is understandable for the reasons advanced on behalf of the Respondents why this should be a pragmatic solution for a company managing ground rents for over 90,000 properties.

41. The Applicant was adamant that he had not set up an online account and consequently not accepted service of notices by email. The Applicant has one property, and does not regularly use email, having no access to a computer. The Respondent did however have his email address.

42. The Respondent referred to another case they had brought before the First - tier Tribunal (Property Chamber) where the case they had to meet was similar to the present case. They produced a copy of the decision. However in that case, it was accepted that the Applicants had agreed to accept rent demands by email (paragraph 7). There is no such acceptance in this case.

43. The Respondent made extensive submissions on the process used to set up online accounts, and asserted that the Respondent had set up an account on the 10 June 2010, but there was no documentary evidence or audit trail to corroborate the assertion that the Applicant himself had set up such an account. All the documentation submitted referred to his postal address, and could have as easily been sent by post. There was no evidence as to when the Applicant had provided his email address to the Respondent.

44. The Respondent manages over 90,000 properties. The Applicant owns and lives in one. There was evidence he had offered to pay his ground rent, but the Applicant refused it without his agreeing to pay their administration fees, which he strongly disputed.

45. The Tribunal was not satisfied that the Respondent could establish that the Applicant had agreed to alter the terms of his lease to accept service of notices by email, for the following reasons:

(a) The lease is clear that the provisions for service of documents be as set out in s196 Law of Property Act 1925. To depart from this position needs a clear agreement between the parties, particularly for a fundamental point such as service of notices.

(b) There was no audit trail provided as to completion of any contractual agreement by the Applicant. There was no evidence available as to who, if anyone, had set up the account.

(c) The Respondent's systems were clearly not infallible. Their records showed payment having been made by cheque, when documentation provided by the Applicant clearly showed it was paid by card transfer.

(d) The Respondent submitted that the account could not be set up internally by them. They invited the Tribunal to accept that the account was set up by the Applicant, or someone (presumably Ms Lewis) acting on his behalf.

(e) If an account was created online by another person, there was no evidence that they had any authority to alter the terms of the lease on his behalf. The Tribunal did not accept Mr. Stevenson's submissions that the law of agency would result in the Applicant being bound for example by Ms. Lewis, having details of his unique property number, in paying his rent on line, accepting on his behalf an alteration of the terms of his lease.

(f) All that would be required to set up the account on line would be the Applicants's name and the Property address, and the property reference number. This was available on the invoices. Had the Applicant asked a third party to pay his account on line, it would be far from clear that a fundamental term of the lease was being changed; the Respondent took no steps to ensure that persons other than their leaseholders could create an on line account.

(g) The screenshot of the agreement page on the website stated that "all your rent demands will be sent by email, which is our primary point of contact with you". These words are not in the Tribunals view sufficient to operate as an acceptance by the Respondent to an alteration of lease terms to accept service of documents by email, or that they will no longer be sent by mail. Sending a demand is one thing; provisions to accept service of a demand is another.

(h) If the Respondent wishes to alter the terms of a lease, created by deed, then steps should be taken to ensure:

i. It is clear to Leaseholders that the terms of the lease is being altered.

ii. It is clear to Leaseholders that they will no longer receive notices by post, but only by email.

iii. that the account can only be set up by the leaseholder, or someone properly authorised by them.

iv. they are notified in writing by mail that the lease terms have changed, to reduce the risk of the terms being inadvertently changed.

(i) Ms Williams referred in her statement at paragraph 10 to a confirmatory email that would have been sent out to the Applicant to the email address. However no copy of such an email was provided to the Tribunal; it would have been preferable for such a communication to be sent in writing, by mail to avoid problems as in the current case.

(j) The Applicant could have telephoned Simarc's offices to enquire as to how much ground rent was owing, (whether or not a reminder was received by post or email) and paid over the telephone. There was evidence he had paid over the telephone, because Ms Williams accepted the payment recorded (incorrectly) as being made by cheque must have been taken over the telephone.

46. Even had the Tribunal determined that the Respondent had agreed to accept service of notices by email, we would not have been satisfied that it was reasonable for the Applicant to pay the administration charges sought. It was inappropriate for the Respondent to write to the mortgagee (by post) before writing to the leaseholder by post, without ascertain whether his email address was active. Whilst email is a convenient and cost effective method of communication, there are many reasons why emails might fail. The Tribunal would only have permitted the costs of a letter to the Respondent, and the costs of investigating title to obtain up to date address details from the Land Registry, and not the extra costs incurred without attempting to send a letter to the Applicant first.

47. Ms Williams confirmed in evidence that more recently their procedures have now changed, and presumably they recognise now that it is prudent and reasonable to write to the Leaseholder by post rather than simply contacting the mortgagee and running up administration costs. That would certainly make sense in a case like this where no emails had been sent by the Respondent to the Applicant from the email address held on their system; the address on the face of it belonged to a female when the (sole) leaseholder was a male, and it would have been clear from the office copy entries that this single leaseholder was an owner occupier, and not, for example an overseas investor. Once bills were outstanding, and no response was made to emails, attempts should have been made to contact the Applicant either by letter or telephone.

48. The Respondent was dogmatic in their demands that the Applicant must pay ground rent together with interest and administration charges, not recognising any shortcomings with their system. The Applicant had offered to pay his ground rent, but the Respondent refused to accept it unless he simultaneously paid the administration charges (which he disputed).

49. The Respondent submitted that Tribunal had no need to make an order under s20C of the Landlord and Tenant Act 1985 as the Respondent has no entitlement to charge for service charges under the lease; services are conducted by a separate management company, with provision for the Respondent to carry out services in default. Had such an order been necessary, the Tribunal would have made an order under s20C that the Respondent would be prohibited from charging the Applicant in relation to the costs of these proceedings, as the Applicant has been successful in his application.