12524

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AQ/LSC/2017/0421**
Property	:	**Flat 2 Stonegrove House, Stonegrove, Edgware HA8 7TG**
Applicant	:	**Classic International Corporation Limited**
Representative	:	**Mr Charles Coleman, Director**
Respondent	:	**Stonegrove House Limited**
Representative	:	**Mr Rajesh Nihalani, Director**
Type of application	:	**For the determination of the reasonableness of and the liability to pay an administration charge**
Tribunal members	:	**Ruth Wayte (Tribunal Judge)** **Duncan Jagger MRICS**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of decision	:	**19 December 2017**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the sum of £3,042.80 is payable by the Applicant in respect of the administration charge for the costs incurred pursuant to clause 3(1)(f) of the lease.

(2) The tribunal does not make 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.

The application

1. The Applicant seeks a determination pursuant to Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of administration charges payable by the Applicant in respect of legal and freeholder costs claimed from the leaseholder under the lease.

2. Directions were given on 1 November 2017 setting the application down for determination on the papers unless either party made an application for a hearing within 7 days. The Respondent applied for a hearing in its Statement of Case dated 30 November 2017. The Applicant objected on the basis that the request was out of time and no further response was made to that objection. In the circumstances this matter has been determined on the papers in accordance with the directions.

3. The relevant legal provisions are set out in the Appendix to this decision.

The background

4. The property which is the subject of this application is one of eight flats let under long residential leases. The Applicant's lease is dated 21 December 1984 and was made between Buildquest Limited and Dhanji Lalji Patel for a term of 99 years commencing on 24 June 1976. The specific provisions of the lease will be referred to below, where appropriate.

5. There had clearly been a history of disputed service charges and at least one previous tribunal application, in 2012. The latest dispute appeared to have been settled by the Applicant's payment of £4,832.20 under cover of a letter dated 18 July 2017.

6. Following payment the Respondent's managing agents, Rennie & Partners, sent a demand in respect of the disputed administration charges dated 23 August 2017. The total claimed was £4,471.80, comprising solicitor's costs of £3,465 and landlord's costs of £1006.80.

7. The Applicant objects to the costs on the basis that they are not recoverable under the lease and/or reasonable in amount.

The lease

8. The Respondent relies on the tenants covenant in clause 3(1)(f) of the Lease: " *To pay all expenses (including Solicitor's costs and surveyor's fees incurred by the Lessor incidental to the preparation and service of a Notice under Section 146 of the Law of Property Act 1925 notwithstanding forfeiture is avoided otherwise than by relief granted by the Court.*"

9. It is common ground that no notice was ever prepared or served. In the absence of agreement, a determination of the breach of covenant/service charge arrears is now required prior to the service of any section 146 notice. Such an application was threatened by the Respondent in its correspondence dated 7 September 2016 and 13 April 2017 and by its solicitors N.R.Russell & Co in their letter dated 11 July 2017. That final letter led to the payment by the Applicant and therefore no proceedings were necessary.

10. The costs claimed by the Respondent date from 11 July 2016 through to August 2017. Copies of the correspondence were provided by the Respondent which support the Respondent's claim that it sought advice in respect of forfeiture proceedings at the outset. The letters from the Respondent follow advice from the solicitor, with the final letter being initially drafted by counsel. The question was whether these costs were incurred incidental to the preparation and service of a section 146 notice.

11. The Respondent relied on *Freeholders of 69 Marina, St Leonards on Sea v Oram* [2011] EWCA Civ 1258 which allowed the cost of proceedings on the basis that they were necessary before a notice could be served. They also produced the case of *Barrett v Robinson* [2014] UKUT 322 (LC) which emphasised the need to show forfeiture was in the contemplation of the landlord, as well as to consider the terms of the particular covenant. Finally, *Willens v Influential Consultants Ltd* [2015] UKUT 0362 (LC), where the failure of the solicitors to mention forfeiture in their letters to the tenants was not fatal to the claim for costs as the landlord could prove their contemplation by reference to their instructions to that solicitor.

12. The Applicant's response was that this particular clause is more narrowly worded than usual, missing the phrase "*or in contemplation of [forfeiture]*" which was a common feature of all the clauses considered in the Respondent's authorities. There had been no proceedings as the disputed service charges had been paid. In the circumstances the Applicant claimed that no costs had been incurred which were caught by this tenant's covenant.

The tribunal's decision

13. Reading the whole of the clause, the tribunal determines that its intention is to provide for reimbursement of the landlord's costs in respect of forfeiture, regardless of whether proceedings (tribunal or court) are issued or required. In this case it is clear from the contemporaneous correspondence between Mr Nihalani and the solicitors that forfeiture was in the mind of the landlord and the advice and correspondence was incidental to establishing liability for the service charges and therefore determining the breach of covenant. The fact that payment was made prior to any proceedings, therefore avoiding forfeiture, does not extinguish liability under the clause.

Reasonableness of the costs

14. Dealing first with the costs claimed in respect of Mr Nihalani's time, the objection raised by the Applicant focuses on the alleged failure of the Respondent to provide accurate information in a timely manner. However, the Applicant also states that the tenant paid the outstanding service charges not because a full and proper explanation had finally been given but because it had become un-commercial to try to obtain any further explanation.

15. The Respondent had provided a copy of an agreement with Mr Nihalani which provided for payment of his time at £100 per hour. No evidence was provided that this amount had been increased to the £125 per hour claimed. The work and time was linked to the solicitor's costs and claimed at a total of 8 hours plus copying costs.

16. The solicitor's time was charged at £375 per hour. Again, the main objection on the part of the Applicant was that it was not reasonable for the landlord to pay for solicitors to deal with perfectly reasonable queries raised on the service charge accounts, although again it is also maintained that answers have not in fact been given.

17. The Respondent sought to justify the rate on the basis that the solicitor has 27 years experience with a City of London law firm. The advice sought and work undertaken was reasonable in the circumstances. The total time claimed was 6.9 hours.

The tribunal's decision

18. The basis for the determination of costs is what is referred to as the "standard basis", namely what is reasonable both in time and amount, with any doubt determined in favour of the paying party. The tribunal rejects the Applicant's argument that reasonableness should be determined with an eye to the long standing dispute. The charge is in respect of costs incurred due to unpaid service charges. What the Applicant should have done to avoid any liability for costs is pay the amount and then dispute the charges by way of proceedings within this tribunal, if advised.

19. Taking the solicitor's costs first, the tribunal has had regard to the Supreme Court Costs Office guidelines for hourly rates. The most senior fee earner in an outer London postcode has a guideline rate of £225-263 per hour. The guidelines have not been updated since 2011 and in the circumstances the tribunal determines that a reasonable hourly rate is £300. Overall the time taken was reasonable, with the exception of counsel's fees in respect of the letter before action. An experienced solicitor should have had no need to instruct counsel for this task and therefore counsel's fees are disallowed. The time taken to instruct counsel provides sufficient time for the drafting of the letter and confirmation with the client. In the circumstances the further 3 units are also disallowed, reducing the total time to 6.6 units, and the solicitor's costs to £2,376 including VAT.

20. In terms of Mr Nihalani's costs, his agreement with the Respondent limits his hourly rate to £100. The tribunal also considers it reasonable to limit his time to no longer than that taken by the solicitors, reducing this invoice to £660 plus copying costs of £6.80.

21. In the circumstances the tribunal determines that the administration charge payable by the Applicant is £3,042.80

Application under s.20C

22. In the application form, the Applicant applied for an order under section 20C of the 1985 Act in order to prevent the costs of these proceedings being passed through the service charge. No response was made to this application but the tribunal does not consider that the lease contains an appropriate costs clause: the Fourth Schedule would not appear to apply. However, taking into account the determinations above, the tribunal determines that it would not be just and equitable for an order to be made under section 20C of the 1985 Act in this case.

23. Since 1 April 2017 it has also been possible for a tenant to apply for an order under 5A of the 2002 Act reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation

costs. The form used by the Applicant in this case did not contain the application which may be why none was made. No administration charges have yet been raised in respect of this claim and the Applicant would be able to challenge them by way of a further application in due course. However, the tribunal has some sympathy with the Applicant's claim that the Respondent has unnecessarily complicated matters and that the documentation produced by them was excessive.

Name: Ruth Wayte **Date:** 19 December 2017

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

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 2

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

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).