



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

Case reference : **MAN/00CY/LAC/2020/0006**

Property : **21 Calder, Barkisland Mill, Beestonley Lane, Barkisland, Halifax, HX4 0HG**

Applicant : **Julia Robinson and Brian Green**

Representative :

Respondent : **Simarc Property Management Ltd
Gray's Inn Capital Limited**

Representative :

Type of application : **Commonhold and Leasehold Reform Act 2002 Sched 11 Para 5**

Tribunal member(s) : **Judge J White
Valuer Mr H Thomas FRICS FCABE
MEWI
Paper(P)**

Venue : **Northern residential Property First-tier Tribunal, 1 floor, Piccadilly Exchange, 2Piccadilly Plaza, Manchester, M1 4AH**

Date of determination : **5 May 2021**

Date of Decision : **17 May 2021**

DECISION

The charges for the Notice of Assignment, Deed of Covenant and Notice of Underletting are not Administration Charges in accordance with Schedule 11 Paragraph 1 of the Commonhold and Leasehold Reform Act 2002 (“The Act”). They therefore do not come within our jurisdiction in accordance with paragraph 5.

The Application

1. The Applicants seeks a determination pursuant to the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) as to the liability to pay and reasonableness of administration charges payable by the Applicants in connection with two charges in connection with the purchase and long Lease of 21 Calder, Barkisland Mill, Beestonley Lane, Barkisland, Halifax, HX4 0HG (“the Property”) and one fee in connection with subletting the Property. The Lease is dated 7 September 2001. Simarc Property Management Ltd (“Simarc”) is the Management Company and Gray’s Inn Capital Limited the Landlord.
2. The application was made on 21 November 2020 and on 2 February 2021 the Tribunal issued directions. In compliance with those directions the parties made submissions, and each filed a bundle of documents.
3. The Directions stated that the Tribunal did not consider an inspection would be needed and it would be appropriate for the matter to be determined by way of a paper determination. Neither party had objected. The Tribunal convened on 5 May 2021 without the parties to determine the application. It decided that there was enough evidence to determine the application without the need for an inspection or oral hearing. It was in the interests of justice to do so and in accordance with the Overriding Objective.

The Law

4. Paragraph 1 of Schedule 11 to the Act provides as follows-
 - (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.

5. Paragraph 2 of Schedule 11 to the Act provides that a variable administration charge is payable only to the extent that the amount of the charge is reasonable.

6. Paragraph 5 of Schedule 11 to the Act provides as follows-

(1) An application may be made...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) ...

(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) ...

The Issues

7. The Application and Response raises the following issues:

(i) Whether the fee paid in connection with the conveyance on the Property for a Notice of Assignment of £145 plus VAT is an administration charge under the Act. If so is it reasonable.

(ii) Whether the fee paid in connection with the conveyance on the Property for a Deed of Covenant of £258 plus VAT is an administration charge under the Act. If so is it reasonable.

- (iii) Whether the fee charged and paid in connection with underletting is an administration charge under the Act. If so is it reasonable.

The Applicants case

8. The Applicants submitted a brief statement of case together with a schedule of disputed charges and Reply to the Respondents statement as set out below .

The Respondents case

9. The Respondent submits that the Tribunal lacks jurisdiction to determine the payability of the fees as they are not Administration Charges in accordance with Schedule 11 of the Act.
10. They refer to four First Tier Tribunal (FTT) decisions MAN/OOCG/LAC/2008/004-005, CAM/26UJ/LAC//2010/0001, CAM/11UF/LSC/2009/0070, and CAM/42UD/LAC/2009/0007 involving the Respondent in relation to different properties and landlords. The decisions held that, inter alia fees payable for notices to underlet were not Administration Charge within the meaning of paragraph 1(1)(a) of the Schedule to the Act.

The Lease

11. The parties refer to the following Tenants covenants contained in Schedule 3 Part A (my emphasis added):-

11.1 Not during the term hereby granted to assign or sub-let part only of the Apartment

11.2. Upon any assignment or stop-letting (for a term not exceeding 21 years) of the whole of the Apartment

11.2.1. Not to so assign sublet or otherwise part with possession of the apartment..... without first notifying the management company of the tenants intention to do so..."

11.2.2 "the tenant will procure the intended assignee or sublessee contemporaneously with such assignment or subletting shall at the expense of such assignee or sublessee to enter into a direct covenant with the Landlord and the Management Company to perform the covenants

restrictions and obligations on the part of the tenant contained in this Lease including this present covenant in the form contained in Schedule Six....

12. Within 14 days of any assignment underlease grant of probate or administration assent transfer mortgage charge discharge order of the court or other document relating to or affecting the term to give notice thereof in writing to the landlord solicitors or agents for the time being and in the case of a document produce to them a certified copy of it for registration by them and paid to the Landlord Solicitors or Agents are reasonable administration fee being not less than £30 plus VAT".

Issue 1: Notice of Assignment

The Applicants Case

12. The Applicant states "Schedule 3, Clause 12 of the Lease states that the fee for this should be 'a reasonable administration fee being not less than £30 plus VAT'. Simarc have been asked to explain why they need to charge £145. We paid £145 plus VAT (£174) via our solicitor on purchase. Our Lease states £30, if Simarc want to charge more they should have to explain why and justify the charge in relation to the time spent on the task and the skill/pay rate of the employee completing the task".
13. They enclose evidence of the charge including Conveyancing Statement and various correspondence in relation to the Applicant querying the reasonableness of the charge.
14. They submit that "Modernising the Home Moving Process" states that a reasonable fee for a Notice of Assignment is £25 and should take no longer than 15 minutes of administrative time. Where both a Notice of Assignment and a Notice of Charge are required the joint fee should be £35 for both"

The Findings

15. In the Applicants schedule they refer to a fee of £145 plus VAT via our solicitor on purchase and that Schedule 3, Clause 12 of the Lease states that the fee for this should be 'a reasonable administration fee being not less than £30 plus VAT'. They submit that the Respondent should have to provide an explanation.
16. They refer to "Modernising the Home Moving Process" which is the Conveyancing Association recommendations for administration charges payable in conveyancing. They have found that "the costs charged for the provision of ..information is often excessive" (see page 12). They make recommendations including reasonable fees after talking to a range of stakeholders. They recommend that a reasonable fee for a Notice of

Assignment is £25 and should take no longer than 15 minutes of administrative time. Where both a Notice of Assignment and a Notice of Charge are required the joint fee should be £35 for both (see page 65).

Our Determination

17. A Notice of Assignment is not an Administration Charge within the Act and consequently the Tribunal do not have jurisdiction over the payability of the fee of £145 plus VAT. We cannot make a determination on reasonableness.

Reasons

18. The Tribunal can only make a determination where we have jurisdiction to do so. Paragraph 5 of Schedule 11 of the Act confers jurisdiction in relation to administration charges. Administration Charges are defined by paragraph 1 as set out above.
19. A charge for the assignment, is payable in accordance with Clause 12 above. This type of charge is not an administration charge within the definition of the Act as it is not “for or in connection with the grant of approvals under his lease, or applications for such approvals.” This is because it does not relate to a consent or “approval”.
20. It would include a consent to the registration of a disposition at HM Land Registry which is required under a tenant covenant contained in the lease: *Goodkind and Goodkind v Investland (Commercial) Ltd LON/00AM/LAC/2012/0002, LVT (as referenced in Butterworths Property Law)*.
21. It does not come within 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*”; This is because it is not the Landlord who is providing information or documents unlike in *Lockley v Lawrence Mansions (Management) Ltd CHI/00MR/LAC/2016/0012, (as referenced in Butterworths Property Law)* where the FTT determined that a fee of £200 plus VAT charged by the Respondent's Agent for answering Leasehold Property Enquiries on form LPE1 put to it by the Applicant's solicitor in contemplation of a sale of the Property was an Administration Charge. In that case the Managing Agent was providing information.
22. Clearly Paragraph 1 c) and d) as set out above do not apply as the Applicants have made payments. It is also likely that as this payment was made prior to purchase, the Applicant was not at that stage a party to the lease.

23. The Conveyancing Association supports this conclusion. At 2 of Modernising the Home Moving Process it states that “ existing legislation... is not working effectively for Leaseholders” and at 2e:-

“ The First Tier Tribunal do not have jurisdiction over many of these costs due to the restrictions of the.. Act Schedule 11 wording, which only covers the administrative costs for consents or the provision of information and not the costs involved in for example, a Deed of Covenant, Certificate of Compliance or receipt of notice of a Notice of Assignment” (page 30)

24. The Respondent has provided copies of some FTT decisions. All support this view, and all are still good law, though do not set precedents that have to be followed. In CAM/42UD/LAC/2009/0007) the Judge commented at paragraphs 30-31:-

“why this particular charge is not included within the list , when fees for notifying landlords transactions affecting the property are commonly imposed in lease covenants, is a complete mystery; but that is the state of the law. The tribunal therefore has no jurisdiction under Schedule 11 to deal with this charge.

That would appear to mean that if a lessee is prepared to tender only what he regards as a reasonable fee (being not less than £30 excluding VAT[the specified in the lease]) when giving notice ...then the freeholder’s options would be :

- (a) *Accept*
- (b) *Issue County Court proceedings (on the small claims, where legal costs are usually irrecoverable) and seek to persuade the District Judge that the fee is reasonable.*
- (c) *Apply to the...Tribunal. For a determination under section 168 of the Act that a lessee is in breach of covenant, prior to service of a section 146 notice. Under that jurisdiction the tribunal can then determine whether the failure to pay a substantially higher fee than that mentioned in the lease is a breach if a proper, or “reasonable” amount has been tendered.” [37-8]*

Issue 2: Deed of Covenant

Findings

25. On 17 September 2018 following completion on 10 September 2018 the Respondent charged a fee of £258 for a Deed of Covenant. They paid £215 plus VAT (£258) despite disputing the charge through their

solicitors and direct with Simarc. They have “written to Simarc several times requesting an explanation of how these charges are reasonable. Simarc have refused to justify the charge in relation to the time spent on the task and the skill/pay rate of the employee completing the task”.

26. The Applicants submits that in CAM/ 42UD/LAC/2014/0003 the Tribunal found that '£80 is a reasonable charge for a Deed of Covenant.'
27. They provide the demand for the Deed of Covenant after Completion together with correspondence from their solicitor and a letter to Simarc requesting explanation of the charge and justification that it is reasonable.

Our Determination

28. The fee of £258 plus VAT for a Deed of Covenant is not an Administration Charge within the meaning of the Act. The Tribunal do not have jurisdiction to make a determination on reasonableness and payability.

Reasons

29. Though fees for the preparation of a deed of covenant can be treated as an administration charge, it depends if it was provided 'by or on behalf of the landlord'. The Letter dated 17 September 2018 states:-

“Please be advised that our clients require their approved deed of covenant to be completed. You will need to download the relevant deed of covenant from our website at ... This should be completed in signed by your clients and return to this office will stop our clients’ fees of £258 inclusive of the 80 is payable”.

30. If a deed of covenant is prepared and submitted by the assignee's conveyancer, a fee demanded in respect of the deed prepared by the lessee would not be an administration charge because the document was not provided 'by or on behalf of the landlord'.
31. In the case CAM/ 42UD/LAC/2014/0003 supplied by the Applicant, the Respondent charged the fee for, inter alia, “preparing the draft deed of covenant” [80].
32. However, in this case, though the Deed of Covenant was a document specific to Simarc provided by the Landlord’s agent from their website; it was completed and signed by the Applicant and their solicitor as in the other FTT cases discussed above. They are not making a charge for the provision of the document or information.

33. This is supported in the Upper Tribunal case of *Proxima GR Properties Ltd v McGhee [2014] UKUT 0059(LC), LRX/136/2012* discussed below.

Issue 3: Charge for Underletting

Findings

34. Schedule 3, Clause 12 of the Lease states that the fee for underletting should be 'a reasonable administration fee being not less than £30 plus VAT'.
35. On 11 December 2018 Simarc wrote to the Applicants stating:-
- “It is a requirement of the lease that Notice of Underletting is served upon the Freeholder within the stated time after the commencement of letting. The associated fee payable it's £138.00 inclusive of VAT where applicable”.*
36. The Applicant submits documents that evidence the nature of the dispute. On 11 February 2019, the Applicants sent a cheque for £48 inclusive of VAT and stated, “ If you can supply me with evidence that the work involved justifies the higher fee I will of course consider your higher fee” They referred to “an Upper Tribunal case where it was decided that £40 was a reasonable fee for consent for underletting”. The Respondents replied stating the original fee was reasonable, though providing no reasons. There followed numerous letters from Simarc stating that “there may be a breach of the Lease” though not setting out what the breach may be. On 19 August 2019, The Applicants wrote back offering ADR. On the same day Simarc emailed stating that Clause 11.2.2 also required a Deed of Covenant for underletting which would incur a fee of £168 inclusive of VAT. On 13 December 2019 Simarc returned the £48 cheque together with an invoice for £306 for the charges for underletting and sublet Deed of Covenant. On 18 November 2020, following further demands for payments and correspondence, Simarc conceded that the charge for the Deed of Covenant was incorrect as the tenancy was for a term less than twenty-one years, being an AST. On 27 November 2020, following the Application to the Tribunal Simarc reduced the fee to £90 including VAT “as a gesture of goodwill” .

Our Determination

37. The fee for paid for notice of underletting is not an administration charge and the Tribunal has no jurisdiction to make a determination whether the fee charged or paid is reasonable.

Reasons

38. Proxima GR Properties Ltd v McGhee [2014] UKUT 0059(LC), LRX/136/2012 confirmed that a charge for underletting was not an administration charge in accordance with the Act as it was not in connection with a consent. Only a charge for consent to underletting is it an administration charge. This is the case either under the lease or in accordance with section 19(1) of the Landlord and Tenant Act 1927. At paragraph 22 the deputy president of the Upper Tribunal Martin Rodger Q.C said:-

“ A sum payable as a fee for registering a document is not, in my judgment, payable “directly or indirectly for or in connection with the grant of approvals under [a] lease or applications for such approvals” so as to come within paragraph 1(1)(a) of Schedule 11 to the 2002 Act. If a request was made for the landlord’s approval of a proposed underletting, and that approval was granted but the underletting did not then proceed, there would be no question of a registration fee being payable under paragraph 28 because no transactions would have taken place. The written notice which the respondent was required to give under paragraph 27 of the eighth schedule to the lease was not a request for an approval of any sort, nor was the charge which the appellant is entitled to make for registering the transaction of which notice is given a charge for the grant of an approval or in connection with an application for approval.”

39. This reasoning is also applicable to the charges for assignment and deed of covenant.
40. So if the charge is related to the granting of a consent to assignment or underletting that is required under a tenant's alienation covenant the landlord would be entitled under either covenants of the Lease or section 19 (1) of the LTA 1927 to payment of a reasonable sum in respect of any legal or other expenses incurred in connection with such consent. That is the case, even if the lease does not expressly reserve the right to recover such charges from the tenant.
41. As the fee was required for notice of underletting the Tribunal finds that this charge is not an administration fee in accordance with Schedule 11 Para 1 a) or b) as no consent was required.
42. As the Applicant did not consider the fee to be reasonable, they took the only course open to them, that is to pay a sum that they considered reasonable. It is noted that the Respondent have not at any point justified the fee. As the charge is not an administration charge the Tribunal has no jurisdiction to consider whether it is reasonable.

Conclusion

43. The Tribunal noted that Directions stated that this Tribunal had jurisdiction and we found that the charges were not administration charges in accordance with the Act. They therefore did not come within our jurisdiction in accordance with paragraph 5. The Tribunal was only able to reach this conclusion after examination of all the evidence submitted.

Cost applications

44. There were no costs applications, and we found no grounds to make any orders for costs.

Judge J White
17 May 2021

RIGHTS OF APPEAL

1. 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.
2. 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.
3. 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.
4. 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.