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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AP/LSC/2014/0427**
Property	:	**Flat 7, Burleihg Court, Offord Close, Northumberland Park, London N17**
Applicant	:	**Burleigh Court Management Limited (landlord)**
Representative	:	**Mr Gibson as solicitor's agent for Brady Solicitors**
Respondent	:	**Mr and Mrs Neulander (leaseholders)**
Representative	:	**Unrepresented**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Sonya O'Sullivan (Tribunal Judge)**
Date and venue of hearing	:	**14 January 2015 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**14 January 2015**

DECISION

Decisions of the tribunal

(1) The tribunal finds that the sum of £1,690.70 claimed as legal costs is irrecoverable.

(2) Since the tribunal has no jurisdiction over interest, county court costs and fees, this matter should now be referred back to the Shoreditch and Clerkenwell County Court.

The application

1. Proceedings were transferred from the Clerkenwell County Court (under claim number IXVO6113) by order dated 6 August 2014. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Respondents in respect of the service charge years 2008-2012. A claim for legal costs was also included which was amended in the amended Particulars of Claim to the sum of £1,690.70.

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

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 background

4. The tribunal was informed by letter dated 7 January 2015 from Brady Solicitors that the service charges in issue had now been paid by the Respondents. The Applicant requested that the claim be vacated and matter transferred to the County Court for a costs hearing. The Respondents agreed to this request by email dated 12 January 2015.

5. The tribunal declined to vacate the hearing as it was not clear which service charges had been paid and it appeared that the issue of the legal costs claimed in the sum of £1690.70 had not been resolved between the parties. By letter dated 13 January 2015 Bradys wrote to say that the legal costs were not claimed as administration charges but as legal costs in the proceedings. It was on this basis that the Applicant requested that the matter be transferred to the County Court for a costs hearing. The tribunal confirmed by letter dated 13 January 2015 that the hearing would proceed and that the issue of jurisdiction could be raised at the commencement of that hearing.

The hearing

6. The hearing took place at 10am on 14 January 2015. The Applicant was represented by Mr Gibson, a solicitor's agent at the hearing. The Respondents were not represented and did not attend. Enquiries were made of Rextons solicitors, who had acted for the Respondents shortly before the hearing who confirmed that they had not been instructed to attend. The tribunal made attempts to contact the Respondents but the mobile telephone number held on file was no longer available.

The issues

7. At the start of the hearing the tribunal identified the relevant issues for determination as follows:

   (i) Does the tribunal have jurisdiction to consider the legal costs claimed in the proceedings in principle?

   (ii) If the answer to (i) is yes, are the costs recoverable and/or reasonable in amount?

8. Having heard evidence and submissions and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

Does the tribunal have jurisdiction?

9. The tribunal notes as a preliminary point that the county court claim including service charges of £2,473.20 and an administration charge of £1,690.70 was transferred by the county court to the tribunal for a determination of payability.

10. Mr Gibson's instructions in relation to jurisdiction were that the legal costs were not an administration charge and thus did not fall within the tribunal's jurisdiction. He argued that the costs were simply legal costs which would be "*best considered*" by the county court along with the further legal costs which had accrued. He confirmed that the Applicant relied on clause 2(5) of the lease to recover the costs.

11. The tribunal heard that although the particulars of claim had been amended in the county court to include a claim for costs in the sum of £1,670.70, the legal costs now stood at over £11,000. The tribunal's jurisdiction is limited however to the amount referred to it in the sum of £1,670.70.

12. Mr Gibson agreed that the Applicant relied on clause 2(5) of the lease and had claimed in the amended particulars of claim in the County

Court that the costs were "*a contractual liability*" pursuant to the provisions of the lease. The tribunal referred Mr Gibson to the provisions of clause 1 of Part 1 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 which defines the meaning of administration charge and is set out in the schedule attached.

13. Mr Gibson had no instructions to concede this point but made no further submissions in relation to whether the charges fell within these provisions.

Does the tribunal have jurisdiction? - The tribunal's decision

14. The tribunal finds that the legal costs claimed are in principle administration costs and thus fall within the tribunal's jurisdiction. This is because the Applicant clearly relies on a contractual provision contained at clause 2(5) of the lease and the tribunal finds that the charges therefore fall within the meaning of administration charges set out above.

Are the costs recoverable and/or reasonable in amount?

15. The tribunal went on to consider whether the costs were recoverable and/or reasonable.

16. The basis of the Applicant's claim was clause 2(5) of the Lease under which the Respondents covenanted;

"To pay all costs charges and expenses (including Solicitors costs and Surveyor fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of a notice under Sections 146 and 147 of the Law of Property Act 1925 notwithstanding that forfeiture may be avoided otherwise than by relief granted by the court".

17. The tribunal asked if the Applicant had any evidence of the Applicant's intentions in relation to forfeiture. Mr Gibson produced a copy of a letter dated 20 November 2014 which it was said had been sent by Brady solicitors to the Respondents. The copy produced was not on headed paper and the tribunal has no witness statement to confirm that this letter had in fact been sent. This letter purported to set out the grounds upon which the Applicant believed it could recover legal costs in a small claims matter. The letter referred to clause 5 (it appears this should have been a reference to clause 2(5)) and set out the section 146 costs provision referred to above. It went on to explain the law as seen by the Applicant in saying that a determination of the amount of service charge payable is required before a landlord may forfeit a lease and that the landlord by seeking such a determination is clearly in contemplation of a section 146 notice. It goes on to refer to various case law and concludes by saying

"Should your clients fail to make payment the costs will increase and you will ultimately be responsible to pay them in accordance with the terms of your lease. We would therefore encourage you in the strongest terms to make payment forthwith in order to prevent further proceedings and further costs from being incurred".

18. There is no reference in the letter to any intention to serve a notice under section 146 in the event that a decision is made by the court or tribunal that the service charges are payable. Mr Gibson was unable to provide the tribunal with any further documentation which would be of assistance to the tribunal in this regard.

Are the costs recoverable? – the tribunal's decision

19. As a preliminary point the tribunal would say that it had very little evidence to assist it in making a decision. No documentation had been included in the hearing bundle which was relevant to the issue of costs. The Applicant's solicitors had instructed a solicitor's agent who had been instructed the day previously. He appeared to have been given very limited instructions. He had been provided on his ipad with a copy of a costs schedule covering the period 16 November 2011 to 14 January 2015 in excess of £11,500. This was unsigned and undated. It did not provide any breakdown of time spent in relation to any specific period and thus was of little use to the tribunal in identifying the time spent in relation to the relevant costs. The Applicant was poorly prepared.

20. The tribunal considers that in principle expenditure in relation to legal costs in proceedings before the county court or tribunal under section 27A of the Act are capable of falling within clause 2(5). However in order to do so the tribunal considers that this expenditure must have genuinely been for the purpose of or incidental to the preparation or service of a notice under section 146. The service of a notice must have been an option that the landlord had in mind at the time the expenditure was incurred. The tribunal does not consider that the section 146 provision is a general indemnity against all legal expenditure arising as a consequence out of a breach of covenant. It is clearly specific to the preparation and service of notices under section 146 and cannot be relied upon where a landlord cannot prove that the expenditure it seeks to recover was incurred with the service of a section 146 notice in mind.

21. From the information before the tribunal no notice under section 146 has ever been served on the Respondents. Further no correspondence was before the tribunal which threatened service of such a notice or mentioned it as a real possibility. As far as the letter dated 20 November 2014 was concerned this appeared to the tribunal to be an attempt to justify how costs can be claimed in principle in the case of a section 146 provision. There was no specific reference to or threatened service of a notice under section 146 on the Respondents contained in

that letter and indeed it concluded with a vague reference to *"further proceedings"*. In addition the tribunal had no evidence that this letter had in fact been sent to the Respondents. The Applicant could have waived privilege and disclosed any relevant legal advice or internal consideration of the option of forfeiture.

22. Thus on the basis of the evidence before the tribunal the only action it appears that the Applicant had in mind was action for the recovery of the service charge as a debt without any reliance on section 146 of the threat of forfeiture.

23. The tribunal therefore finds that the costs claimed by the Applicant in these proceedings in the sum of £1,690.70 were not incurred for the purposes of or incidental to the service of notices under section 146 requiring remedy of breaches of covenant by the Respondents. The tribunal therefore concludes that the costs do not fall within the scope of clause 2(5) of the lease and are therefore irrecoverable.

24. Given that the tribunal found that the costs are irrecoverable it did not go on to consider the reasonableness of the amount claimed.

25. As stated above the costs before us were limited to the sum of £1,690.70 as transferred to us by the county court. The tribunal understands that further costs have since been incurred which may be the subject of a further claim in the county court. The tribunal directs that a copy of this decision shall be produced to the Presiding Judge in connection with any further claim for costs in relation to these proceedings.

The next steps

26. The tribunal has no jurisdiction over interest or county court fixed costs and this matter should now be returned to the Clerkenwell and Shoreditch County Court.

Name: Sonya O'Sullivan **Date:** 14 January 2015

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

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 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

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).