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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AW/LAC/2017/0014**
Property	:	**6 Ladbroke Gardens, London, W11 2PT**
Applicant	:	**6 Ladbroke Gardens Management Limited**
Representatives	:	**James Sandham of Counsel**
Respondents	:	**Sinty Stemp and Tiffany Stemp**
Representative	:	**Nicholas Trompeter of Counsel**
Type of Application	:	**Reasonableness of and liability for administration charges under Schedule 11 of the Commonhold and Leasehold Reform Act 2002**
Tribunal Members	:	**Professor Robert M. Abbey (Solicitor)** **Sarah Redmond MRICS (Chartered Surveyor)**
Date and venue of Decision	:	**16th August and 20th November 2017 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**04 December 2017**

DECISION

Decisions of the tribunal

1. The Tribunal determines that £26,381.98 legal costs or fees are reasonable.

2. The reasons for our decision are set out below.

The application and procedural background

3. The applicant has made an application for a determination as to liability to pay an administration charge or for the variation of a fixed administration charge pursuant to the terms of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

4. The applicant is the management company set up to manage the building, comprising five self contained flats, in which the property is located and where the leaseholder of the property held under a long lease are the respondents. The lease of the third and fourth floor property (sometimes called the maisonette) is dated 20 August 2015 (by a deed of variation) and is now held for a term of 999 years from the 17th September 1973 and the respondents are assignees of the original lessee.

5. The applicant's claim covers legal costs incurred in Tribunal proceedings under case reference LON/OOAW/LDC/2016/0045 and LON/OOAW/LSC/2016/0193. At a directions hearing on 6 June 2017 Judge Carr listed one main issue, the reasonableness and payability of legal costs totalling £43,969.96

6 The relevant legal provisions relating to this matter are set out in the Appendix to this decision and rights of appeal made available to parties to this dispute are set out in an Annex.

The hearing and decision

7. Both the parties attended at the hearing on two separate days and both made detailed submissions as to the matter of the claim for legal costs including the reasonableness of the proposed charges.

8. By virtue of clause 3 and the fourth schedule of the lease the respondents are obliged to contribute towards the costs incurred by the applicant in complying with the landlords obligations in the lease and the other leases of the flats in the building. On or about 14th March 2016 a demand was made by D&S Property Management (the agents) requiring payment of the sum of £18,971.72 for service charges under the above mentioned lease terms. The monies were not paid and as a result an application was made to this Tribunal pursuant to s27A of the Landlord and Tenant Act 1985 and this proceeded to a determination under case reference

LON/00AW/LSC/2016/0193. The applicant says that this application was submitted as a first and preliminary step in the preparation and service of a notice pursuant to S.146 of the Law of Property Act 1925. This will be considered in detail later in this determination. A dispensation application was also made under reference LON/00AW/LDC/2016/0045 and this too proceeded to a determination and was heard together with the S.27A application. The Tribunal issued a decision dated 16th December 2016 a brief summary of which is set out in the following paragraph of this decision.

9. In respect of the S27A application for the year ended March 2017 the Respondent was required to pay £37,943.44 being the sum claimed. As for the remainder of the application the Tribunal determined that £3536.56 was payable against the sum claimed of £7306.55. In respect of the s20ZA application dispensation was granted in regard to scaffolding works and thus the sum claimed was payable. However, dispensation was refused in respect of emergency works and thus only £250 was payable. With regard to a subsequent Rule 13 costs application by the respondent this failed in its entirety.

10. In this application the applicant seeks costs pursuant to clause 2(vi) of the lease which states that:-

> *"....the lessee will pay the lessor on demand all costs charges and expenses (including legal costs and surveyor's fees) which may be incurred by the lessor or which may under the terms of the lease or otherwise become payable by the lessor under or in contemplation of any proceedings in respect of the maisonette under section 147 "(sic)" or 147 of the Law of Property Act 1925 or in preparation and service of any notice thereunder respectively and arising out of any default on the part of the lessee notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court".*

11. The applicant asserts that in contemplation of forfeiture of the respondents' lease the applicant incurred costs and disbursements amounting to £43,969.96. These monies were demanded of the respondents but remain unpaid and hence the current application before the Tribunal. At the hearing Dr Patricia Lee, the basement flat owner and a director of the applicant company gave evidence for the applicant as did Steven John Newman, an in house solicitor with the agents. Sinty Stemp gave evidence for herself and her sister, the respondents.

12. Both Counsel accepted that there were some fourteen points of objection or issues raised by the respondents to the claim for costs. I will deal with each in turn.

13. Issue one considered whether the applicant was entitled to use legal services otherwise than through a firm of solicitors. However, at the

hearing Counsel for the respondents confirmed that he did not take a point on this issue and as such it was not pursued further and we make no finding in that regard.

14. Issue two considered whether there was a contractual liability for the applicant to pay the costs of the in house solicitor with the agents, i.e. the costs raised by Mr Newman. The respondents asserted that no such liability existed. However, the Tribunal was shown a copy management agreement dated 7 May 2015 and made between the applicant Company and the Agents relating to the property. In that agreement there is an express term that covers any legal work undertaken by Mr Newman. The management agreement clause, (4 e), expressly covers the kind of work covered by the costs in this application. In these circumstances the Tribunal was satisfied that there was a clear contractual liability to pay these costs.

15. Issue three questioned the existence of a "fee note" requesting payment of the costs. In fact pursuant to clause 4e of the management agreement two invoices were issued on the 13 January 2017 for £42,294.96 and on 28 February 2017 for £1.675 and copies of both were in the trial bundle and thereby seen and noted by the Tribunal. Indeed it is apparent from the conduct of the parties to the management agreement that there is no dispute about the amounts or their payability, the applicant has accepted its liability to pay the monies claimed. Accordingly the Tribunal is satisfied that there were proper accounts requiring payment and thus the costs had been incurred.

16. The fourth issue questioned whether the applicant had produced timesheets or narratives of the costs incurred. The applicant did produce a summary of expenditure and details of the work done in copy documents in the trial bundle. The Tribunal saw and noted the detailed schedules involved and were thereof satisfied that this issue had been fully addressed by the provision of this detail.

17. The fifth issue related to the existence of any payment by the applicant to the agents in regard to the costs claimed. Dr Lee confirmed in evidence that the majority of the costs had been paid. The Tribunal accepted her evidence in this regard as being supportive of the applicant's position that payments had indeed been made. (As of 17 July 2017 the applicant had in fact paid £34,444.96 of the costs claimed.)

18. Issue six questioned whether the service charge demands were valid and whether forfeiture was possible in these circumstances. The respondents asserted that the applicant had never served on the respondents valid service charge demands and in the absence of such demands no question of forfeitable breach of covenant arises. The Tribunal took the view that this issue had been dealt with properly by the Tribunal in the previous hearing and as such it is not open to the respondents to take a point on the validity of the demands. The Tribunal in the previous hearing required

payment of the service charges and made no determination that there had been an invalid demand. If this was an issue it should have been raised previously and in the absence of an appeal the position is as found by the Tribunal in the previous decision.

19. Issue seven is in regard to the respondents' claim to an equitable set-off. The respondents say that they have been entitled to set off against the subject matter of the original applications their cross claim for damages for breach of the landlords repairing convent under the lease of the property and that the existence of the cross claim is sufficient to extinguish the purported arrears of service charges to nil. Thus there are no arrears in any event.

20. The applicant accepts that it is open to a litigant to set off against a demand for service the sum arising out of damages for a breach of the repairing covenant, see *Continental Property Ventures v White* [2007] L&T R 4. However the applicant says that such a claim in the present proceedings will not succeed because the respondents have not issued such a claim, that no set off was pursued in the original application. Furthermore the applicant says that the respondents have failed to particularise the purported right or claim and has also failed to quantify the equitable claim. Crucially the applicant also says that the respondents has failed to adduce expert evidence dealing with the issues arising out an alleged breach of covenant on the applicant's part.

21. The respondents asserted that the basis for calculation of such damages is explained in *Moorjani v Durban Estates Limited* [2016] 1 WLR 2265. Essentially damages are to be calculated by reference to the impairment to the lessees' rights. Ms Stemp exhibited to her witness statement a single email from Hamptons International in which it is suggested that the local agents could not market the property in its current condition (in July 2017) but once lettable the rental it could command was between £950 to £1100 per week. That was the limited extent of the evidence supplied in support of the counter claim

22. The Tribunal accepted that there was a right to a set off but could not accept that one should operate in this dispute. This was firstly because the respondents have failed to properly quantify the claim. Crucially the respondents have failed to adduce detailed and cross examinable expert evidence dealing with the issues arising out an alleged breach of covenant on the applicant's part and indeed the measure of any purported loss. Secondly the Tribunal thought that if a set off was to be advanced it should have been advanced against the original application and not against this claim for costs. For these reasons the Tribunal will not make a determination regarding set off.

23. Issue eight asked the question whether the right to forfeit had been in some way waived by the applicant. The Tribunal was of the view that it did not have jurisdiction to consider waiver. It did so bearing in mind the

decision in *Swanston Grange (Luton) Management Limited v Langley-Essen* [2008] L&TR 20. In that case Judge Huskinson said and we quote from paragraph 16 of the judgment;

> *"Nothing I say is intended to indicate any jurisdiction in the LVT to consider the separate question of waiver which arises when it is necessary to decide whether a landlord has waived the right to forfeit a lease on the basis of a breach of covenant."*

The Tribunal was therefore of the view that it has no jurisdiction to consider the suggested waiver of forfeiture

24. Issue nine suggested that there was no bona fide intention to forfeit. However, in this regard the Tribunal noted the terms of the email dated 28 April 2016 contained in the trial bundle and made between the applicant and the Agents which in the Tribunal's view clearly demonstrated an intention to forfeit. This stated "....as you have confirmed that the Company is contemplating the forfeiture of the Stemp's lease....I have drafted the attached statement of case to be submitted to the First-tier Tribunal...." The email went on to highlight the fact that an application to the Tribunal is required for a determination that the demanded monies are due prior to the service of a s.146 notice under the Law of Property Act 1925. The Tribunal was satisfied that this email constituted good evidence of the intention to forfeit.

25. Issue ten queried whether the costs attributable to the S20ZA application for dispensation were in contemplation of forfeiture. The applicant asked the Tribunal to see this application as being part of the overall picture and that thus it was necessary and unavoidable. Accordingly the S20ZA application was an incident of the forfeiture process and inextricably linked to it. The Tribunal were not persuaded by this and took the view that dispensation was not part of the forfeiture process. It therefore decided that they would disallow costs that it thought were attributable to the S20ZA application. Counsel for the applicant suggested a 10 to 15% deduction to take this into account. The Tribunal were again not persuaded by this suggested allowance and considered that in the light of the evidence and papers before it that a deduction of 40% properly reflected the balance between the two applications and thus the costs attributable to each of them.

26. Issue eleven was about whether the costs attributable to the part of the S27A application relating to the estimated expenditure to year ending 2017 were not payable because the service charge expenditure had not been incurred. The Tribunal took the view that because the tenant was under an obligation to pay on-account of the estimated costs under the terms of the lease of the property this issue had no effect on the claim for legal costs before it.

27. Issue twelve considered whether the costs attributable to the respondents' application for a Rule 13 costs decision were in contemplation of forfeiture and hence part of the costs claim presently before the Tribunal. It was apparent that unlike the S20ZA application costs these costs were plainly part of the main application in regard to unpaid service charges. The Tribunal took the view that these costs arose directly from the S27A application and were inextricable liked to the claim and were thus part and parcel of this application and consequently there should be no percentage allowance.

28. Issue thirteen asked if the costs were unreasonable because of or by reference to the parties' degree of success. Paragraph 9 of this decision sets out the original determinations. In that regard the applicant was completely successful on the first and primary application regarding the year ended 2017. For the year ended 2016 the applicant was only successful as to approximately half of the claimed sum. On the dispensation one part was successful the other not. On the original Rule 13 costs claim the applicant was wholly successful. In the light of this success rate the Tribunal were of the view that the costs claim was reasonable and should be allowed albeit subject to adjustment as explained above.

29. Issue fourteen considered whether the costs were unreasonable by reference to the allegation made by the respondent that the applicant had acted in a "heavy-handed and bullying manner throughout". The Tribunal did not accept that this was a persuasive argument in the context of these costs. They accepted that the negotiations between the parties had clearly become fractious and difficult but this was no reason to consider that the claim was in any way incorrect.

30. The costs claimed were £43,969.96. For the reasons stated above the Tribunal determined there should be a deduction of 40% giving a final figure of £26,381.98. Therefore, subject to this change, the Tribunal was able to find the amended and reduced charges to be reasonable and thus payable as an administration charge by the respondent in the sum of £26,381.98.

Name: Judge Professor Robert M. Abbey **Date:** 04 December 2017

Appendix of relevant legislation

Commonhold and Leasehold Reform Act 2002

Schedule 11

Administration charges

Part 1 Reasonableness of administration charges

Meaning of "administration charge"

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.

Reasonableness of administration charges

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

3(1)Any party to a lease of a dwelling may apply to a leasehold valuation tribunal for an order varying the lease in such manner as is specified in the application on the grounds that—

(a)any administration charge specified in the lease is unreasonable, or

(b)any formula specified in the lease in accordance with which any administration charge is calculated is unreasonable.

(2)If the grounds on which the application was made are established to the satisfaction of the tribunal, it may make an order varying the lease in such manner as is specified in the order.
(3)The variation specified in the order may be—
(a)the variation specified in the application, or
(b)such other variation as the tribunal thinks fit.
(4)The tribunal may, instead of making an order varying the lease in such manner as is specified in the order, make an order directing the parties to the lease to vary it in such manner as is so specified.
(5)The tribunal may by order direct that a memorandum of any variation of a lease effected by virtue of this paragraph be endorsed on such documents as are specified in the order.
(6)Any such variation of a lease shall be binding not only on the parties to the lease for the time being but also on other persons (including any predecessors in title), whether or not they were parties to the proceedings in which the order was made.

Notice in connection with demands for administration charges
4(1)A demand for the payment of an administration charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to administration charges.
(2)The appropriate national authority may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.
(3)A tenant may withhold payment of an administration charge which has been demanded from him if sub-paragraph (1) is not complied with in relation to the demand.
(4)Where a tenant withholds an administration charge under this paragraph, any provisions of the lease relating to non-payment or late payment of administration charges do not have effect in relation to the period for which he so withholds it.

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 any 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).

ANNEX - 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.