



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

Case Reference : CHI/00HY/LSC/2017/0088

Property : 2A Silver Street, Bradford-On-Avon, Wiltshire, BA 15 1JX

Type of Application(s) : (1) Liability to pay and reasonableness of service charge: Section 27A Landlord and Tenant Act 1985
(2) Liability to pay and reasonableness of administration charge: Paragraph 5 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002
(3) For an order under section 20C Landlord and Tenant Act 1985
(4) For an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002

Applicant : (1) and (2) Mr. Peter James Whipp & Mrs .Victoria June Whipp
(3) and (4) Ms. Anna Baker

Respondent : (1) and (2) Ms. Anna Baker
(3)and (4) Mr. Peter James Whipp & Mrs. Victoria June Whipp

Representative : Omnia Solicitors (for Mr. & Mrs. Whipp)

Tribunal Members : Judge Martin Davey (Chairman)
Mr Ian Perry FRICS

Date of Decision : 16 April 2018

Landlord and Tenant Act 1985

Section 27 A

The Tribunal determines that the relevant costs to be taken into account in assessing the service charge and insurance rent invoiced for the months of May, June, July, August and September 2017 are as follows:

June	£137.88*
July	£126.63*
August	£116.31*
September	£112.37*

***Subject to paragraph 42 of these reasons.**

The costs are however not payable unless and until service of a demand that complies with section 21B of the Landlord and Tenant Act 1985.

Section 20C

The Tribunal makes an order under section 20C that none of the costs incurred by the Landlord in connection with these proceedings shall be treated as relevant costs for the purpose of any future service charge demand.

Commonhold and Leasehold Reform Act 2002

Paragraph 5 of Schedule 11

The Tribunal determines that no administration charge is payable in respect of legal fees incurred by the Applicant in August 2017 in connection with these proceedings or in respect of interest on late payments charged in the 1 September 2017 invoice.

Paragraph 5A of Schedule 11

The Tribunal orders that any liability of the Tenant for litigation costs by way of an administration charge is extinguished.

The Applications

1. By an application (“the Application”) dated 11 September 2017, Mr. Peter James Whipp and Mrs. Victoria Jane Whipp, (“the Applicant”), the Landlord of 2A Silver Street, Bradford on Avon Wiltshire BA15 1JX (“the Flat”), applied to the First-tier Tribunal (Property Chamber) (“the Tribunal”), under section 27A of the Landlord and Tenant Act 1985 (“the 1985 Act”) for a determination as to the payability of service charges by the Respondent leaseholder, Ms Anna Baker, under her lease of the Flat in respect of the months June to September (inclusive) 2017. In turn the Respondent seeks (1) an order under section 20C of the 1985 Act, for the limitation of the Landlord’s costs in respect of the proceedings and (2) makes an application under paragraph 5A of schedule 11 to the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) “to extinguish her liability to pay an administration charge in respect of litigation costs”.
2. The Tribunal issued Directions on 4 October 2017 and 13 March 2018. These resulted in written submissions to the Tribunal from both parties. Although the Application was initially listed, with the agreement of the parties, as suitable for a determination on the basis of written submissions, the Tribunal Judge, having received as requested further representations, subsequently determined that an oral hearing would be appropriate. However, in the Directions of 13 March 2018 the Tribunal cancelled the oral hearing that it had scheduled for 16 March 2018 as being not necessary following correspondence between the parties and the Case Officer. The Tribunal considered the matter, on the basis of the written submissions, on 11 April 2018.

The Lease

3. The Lease of the Flat is dated 2 March 2017. Peter James Whipp and Victoria Jane Whipp (who jointly constitute “the Landlord”) granted the Lease to Anna Claire Baker (“the Tenant”) for a term of 999 years (“the Term”) from 25 March 2016. Clause 2.3 of the Lease provides that “the grant is made in consideration of the Tenant paying to the Landlord the Premium (receipt of which the Landlord acknowledges) and covenanting to pay the Landlord the following sums as rent.
 - (a) the Rent;
 - (b) the Insurance Rent
 - (c) the Service Charge
 - (d) all interest payable under this lease; and
 - (e) all other sums due under this lease.

4. "Rent" is defined in the Lease as "rent at the rate of £60 per annum for the first twenty years of the Term and thereafter an additional £60 per annum, for each completed twenty year period of the Term."
5. The Flat (referred to in the Lease as "the Property") is a first floor 2 bedroom flat in a Building known as 1-2 Silver Street, Bradford on Avon Wiltshire BA15 1JX. The ground floor of the Building comprises two retail shops (defined in the Lease as the Commercial Premises). There is one other flat in the Building on the second floor. There are Common Parts in the Building, including the internal stairway access to the Flat, over which the Tenant has rights. Those parts of the Building other than the Property, the other flat, the Commercial Premises and the Common Parts are referred to in the Lease as the Retained Part.
6. The Lease reserves a Service Charge, which is defined as the Tenant's Proportion of the Service Costs. (An Insurance Rent is also reserved but that was not the subject of any dispute between the parties raised in the Application).
7. Schedule 4 of the Lease contains the Tenant Covenants. Clause 1.1 is a covenant "To pay the Rent to the Landlord in advance on or before the Rent Payment Date by standing order or by any other method that the Landlord from time to time requires by giving notice to the Tenant." The Rent Payment date is defined as 25 March each year.
8. Clause 2 of the same Schedule contains a covenant " To pay the Landlord the Service Charge demanded by the Landlord under paragraph 4 of Schedule 6 by the date specified in the Landlord's notice and for the avoidance of doubt the Tenant's proportion of such sum as the Landlord shall determine by way of a sinking fund to defray future maintenance and renewal costs of the Building, the Retained Parts and the Common Parts."
9. Clause 4 of that Schedule contains a covenant "To pay interest to the Landlord at the Default Interest Rate on any Rent, Insurance Rent, Service Charge or other payment due under this lease and not paid within fourteen (14) days of the date it is due for the period from that date until the date of actual payment whether before or after the judgment." The Default Interest Rate is defined as "4% above the base rate from time to time of Barclays bank plc. or, if that base rate is no longer use or published, a comparable commercial rate reasonably determined by the Landlord."
10. Clause 7 of Schedule 4 contains a covenant "To pay to the Landlord on demand the costs and expenses (including any solicitors' surveyors or other professionals' fees, costs and expenses and any VAT on them) assessed on a full indemnity basis incurred by the Landlord (both during and after the end of the Term) in connection with or in contemplation of any of the following
 - (a) the enforcement of any of the Tenant Covenants;

(d) the provision of a sinking fund to defray the costs of the maintenance repair redecoration and renewal of the Building, Common Parts, Service Media and otherwise as the Landlord may require pursuant to clause 4.1 of the Sixth Schedule.

13. The Tenant's Proportion in relation to the Service Charge is defined as one third in respect of those items (a) (g) and (h) in the definition of Services and 50% in respect of those items listed at paragraphs (b) (c) (d) (e) and (f) (inclusive) in the definition of Services; or such other percentage as the Landlord may notify the Tenant from time to time.

The Dispute

14. Service charge invoices are issued by the Landlord monthly and in arrears. The Landlord seeks a determination as to the payability and reasonableness of the following invoices issued by its apparent agent, Silver Street Management Company (which is not a party to the Lease):

1 June 2017	£137.88
1 July 2017	£126.63
1 August 2017	£116.31
1 September 2017	£1457.82
Total	£1838.64

15. The Lease was granted on 2 March 2017. The first service charge invoice (re costs incurred in March 2017) was issued in April 2017. It had not been paid by 8 May 2017 when the Landlord (by email) sent Ms. Baker the invoice for the service costs incurred in April 2017. On 14 May the Landlord (by email to Ms. Baker) agreed that she could leave a cheque for both monthly payments in the hall at 1-2 Silver Street because he had business in the town on 16 May 2017. Mr. Whipp says that he had orally explained to Ms. Baker that this was a one off arrangement because Ms. Baker had told him that she had not set up internet banking at that stage. He says he told her that in future payments would have to be made by standing order or direct debit. On 16 May 2017 he collected the cheque as arranged and subsequently banked the cheque.
16. From 15 May to 13 June 2017 the Tenant at length queried with the Landlord a number of matters in relation to the Building, including a leak in the Flat, window cleaning and alarm re-setting issues. On 14 June 2017 the Landlord sent the June invoice to the Tenant by email and by email in reply on the same date she stated that she would not pay the invoice. By an email to Mr. Whipp dated 16 June 2017 Ms. Baker said that she would leave a cheque for £100 in the hall. She subsequently said that she would leave a cheque for £50 unless there was an appropriate response and more discussion.

17. By a letter to the Tenant dated 16 June 2017, Mr. Whipp dealt with her queries in detail. He also stated

“Please make all future payments via bank transfer as is specified in the lease” and

“The lease states any payment which is not paid within 14 days of its request will incur a 4% interest charge which we will be required to add on from 1st July if payment is still not made in full. Additionally on the 1st July the next months payment will also become due” and

“ You must also be aware any costs associated with enforcements of the tenants covenants are fully chargeable back to yourself so any solicitor fees, serving or notices and further proceedings costs will be owed in addition to the outstanding bill should it remain unpaid.’

18. On 8 July 2017, after Ms. Baker said to Mr. Whipp that he could not dictate how she should pay the invoiced charges, Mr. Whipp informed Ms. Baker that he intended to instruct solicitors with regard to recovery of the unpaid charges. On 10 July 2017 Mr. Whipp emailed Ms. Baker and said that if she did not have internet banking she could pay by other means, including a cheque into the Landlord’s account. He also stated that if this were not done he would instruct solicitors.
19. Mr. Whipp instructed solicitors on 1 August 2017 and by a letter to the Tenant dated 2 August 2017, at which date the invoices issued in May, June and July remained unpaid, the Landlord’s solicitor (Omnia) demanded payment of the same. The letter warned the Tenant that non- payment would constitute a breach of covenant which may lead to interest being added and possibly to enforcement action for breach of covenant.
20. Ms. Baker had in fact written three cheques, dated 9 June 2017, 9 July 2017 and 3 August 2017 each for £100, in favour of Mr. & Mrs. Whipp. She had left these at the Property to be collected by the Landlord who refused to accept payment in this way. It is unclear as to which invoices these cheques relate because they do not correspond to the sums demanded on any of the invoices against which the Landlord claims payment. It is presumed that they relate to those of June, July and August 2017, although the matter is confused by the fact that the Tenant seems not to have received the June invoice before 14 June 2017. Nevertheless, on 7 August 2017 Ms. Baker sent these cheques, which as noted above were for less than the sums invoiced in the disputed months, to the Landlord’s home address. However, Omnia returned them to Ms. Baker under cover of a letter dated 11 August 2017 as being for the incorrect sums and for being paid by an invalid method. That letter, together with a letter dated 18 August 2017, also informed Ms. Baker that all future correspondence with the Landlord should be directed to Omnia’s office.

21. On 25 August 2017 Omnia wrote to Ms. Baker informing her that they would be making an “application to First-tier Tribunal (Property Chamber) for forfeiture and possession proceedings 7 days from the date of this letter.” On 27 August 2017 Ms. Baker transferred £340 by way of bank transfer to the Landlord. Omnia returned this sum by way of a cheque drawn on the firm’s account and made out to Ms. Baker, because it was not for the sum of £380.82 demanded by the Landlord. In their letters to Ms. Baker dated 29 and 31 August 2017, Omnia stated that they had been instructed “to make an application to the First-tier Tribunal (Property Chamber) for forfeiture” on 8 September 2017 unless you make the outstanding payments in full and directly to the landlords account.”
22. The sums demanded remained unpaid by 1 September 2017, on which date the Landlord, through Omnia, issued the invoice for £1,457.82. It demanded payment within 5 days.
23. The September 2017 invoice included a demand for legal fees of £1,342.68 invoiced to the Landlord by Omnia and late payment interest of £2.77 on the invoiced sums for June, July and August. On 8 September 2017 the Tenant made direct payment to the Landlord by bank transfer of £381 being (slightly more than) the sums demanded in the first three invoices. However, she did not pay the 1 September invoice and now disputes the payability of the Landlord’s legal fees demanded of her.

The Landlord’s case

24. The Landlord’s case is that the charges demanded were payable and unpaid. They say that the invoices served in June, July and August 2017 were not paid into their bank (by bank transfer) until 8 September 2017. However, that payment was refused because by then the sums demanded in the 1 September 2017 invoice, which included the legal fees and interest on the previous three unpaid invoices had become due but had not been paid. The Landlord relies on clause 4 of Schedule 4 to the lease in respect of interest demanded and on clause 7 of that Schedule for the recoverability from the Tenant of Omnia’s fees.

The Tenant’s case

25. Ms. Baker says, in her letter to Omnia dated 15 November 2017, that after paying her first months service charge invoice by cheque she “continued to make payments via this method. Three cheques left one each month and I reminded Mr. & Mrs. Whipp that the cheques were there for collection.” As stated above, she later sent these cheques to the Landlord but they were returned, as was the transfer that she had made to the Landlord’s account, of £340 on 27 August 2017 and that of £381 that she made on 8 September 2017.
26. Ms. Baker disputes her liability for interest on the June, July and August invoices because she says that she made payment of those

invoices (including the disputed cleaning charges) but the payments were returned.

27. Ms. Baker says that because she is not in breach of covenant the legal charges in the invoice of 1 September 2017 are not payable.

Further issue

28. On 28 January 2018, the Tribunal Case Officer wrote to the parties, on behalf of the Tribunal, seeking confirmation as to whether the Landlord had at any time complied with section 21B of the Landlord and Tenant Act 1985; paragraph 4 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002; the Service Charges (Summary of Rights and Obligations and Transitional Provision) (England) Regulations 2007; and the Administration Charges (Summary of Rights and Obligations) (England) Regulations 2007.
29. The Landlord's solicitors replied on 28 January 2018 stating; "Not formally as the tenant was aware of her rights under 2002 Act, as evidenced in her letter dated 15.11. 2017 (paragraph 1), a copy of which is enclosed for convenience, requesting an application under paragraph 5A schedule 11 to the 2002 Act to extinguish her liability to pay 'an administration charges in respect of litigation costs.' This letter was enclosed in the court bundle at page 35."

Discussion and determination

30. This is a most unfortunate case. It originated in the Tenant disputing a £10 cleaning charge and has escalated into Tribunal proceedings as part of the process of the Landlord seeking to recover a far more significant sum running into several thousands of pounds from the Tenant. How did this come about?
31. The Lease was granted on 2 March 2017. Ms. Baker does not, and apparently has never, lived at the Property. Very quickly a disagreement arose between the parties as to the cleaning of the Common Parts. The Tenant, Ms. Baker, says that she only noticed a cleaning charge, which she queried, in the third month of the lease. She says that she had cleaned the Common Parts after taking the Lease and never agreed to a cleaner providing a cleaning service. The Landlord says that Ms. Baker did agree and this is evidenced by a text of 5 March 2017 from Ms. Baker to the Landlord. Of the invoices to which the Application relates only those dated 1 June 2017 and 1 July 2017 include a cleaning charge of £10. Thereafter no charge for cleaning appears on any invoice from the Landlord to the Tenant. It is clear that Ms. Baker is liable for this charge in the June and July 2017 invoices because it is the Landlord's obligation to clean the Common Parts and the charge for this (subject to the test of reasonableness) is payable by the Tenant if demanded. The Landlord and the tenants of the flats are of course free to come to some other arrangement but in this case it is

not established that they had. In fact it is clear that they had agreed to a cleaner for the months of May and June 2017, the costs of which were levied in the succeeding months' invoices. The Landlord dismissed the cleaners at the end of June at the request of the tenants of the flats. Ms. Baker's argument appears to be that she had done unpaid cleaning of the Common Parts at the beginning of the Lease and that this should have been offset against the cleaning charge made in June and July. However, the Tribunal had insufficient evidence as to such an arrangement.

32. From 15 May 2017 onwards Ms. Baker queried a number of matters about the Building. This was done by way of numerous emails. The matters raised included window cleaning on the front of the Building, an alleged faulty alarm system and the state of the guttering. As the Landlords explained in their letter of 16 June 2017 to Ms. Baker, some of these matters were not within the Landlord's service charge obligations and in any event Ms. Baker had not been invoiced for any costs relating to matters which were within that charge because they had been paid from the sinking fund.
33. Nevertheless, Ms. Baker clearly refused to pay the invoiced charges due in June, July and August 2017 in full and by the method requested by the Landlord until 8 September 2017 when she transferred £381 to the Landlord's nominated account. She has also disputed the charges for September 2017. So are the charges payable today? Until and including the invoice sent on June 14 2017, the Landlord sent monthly invoices to Ms. Baker by email. The invoices are in a similar format. They are headed, "Silver Street Management Company", whose address is given as 1-2 Silver Street, Bradford On Avon BA15 1JX, and are addressed to Anna Baker, 2A Silver Street, Bradford on Avon.
34. The charges itemised on the June, July and August 2017 invoices are for (1) electricity usage in the previous month (2) Management Company Sinking Fund (3) Buildings Insurance. In addition, as noted above, each of the invoices for June and July include (3) a cleaning charge of £10 for cleaning to the "Communal Area". The invoices do not specify any method of payment but they state that Bacs Payments can be made to a bank account in the name of P.Whipp & V.Vyse Buildings, details of which account are given on the invoice. The invoices do not state when the payment specified as payable becomes due.
35. The invoice dated 1 September 2017 is in similar format and content, save that it includes in addition firstly, sums for interest (totaling £2.77) on the June, July and August 2017 invoices and a sum of £1,342.68 in respect of "Legal fees in connection with breach of covenant as per enclosed invoice". The enclosed invoice referred to is an invoice to the Landlord from their solicitors (Omnia) dated 31 August 2017 and is for 5.74 hours of work at £185 per hour (plus postal charges and VAT). Secondly the 1 September invoice (unlike the

previous invoices) states, "Please can all cleared payments be made in 5 days of the invoice date."

36. Although the invoices are from the Silver Street Management Company the legal status of this Company is not clear. It is not a management company, for the purposes of being a party to the Lease and thereby responsible to the Tenant for the provision of services. It appears therefore to be an agent of the Landlord, which is in fact controlled by the Landlord. In other words the Landlord is managing the Building through this Company.
37. It is clear that the only Service Charge items charged for by the Landlord are (1) electricity (which is assumed to be for lighting and power to the common parts) (2) (in the case of services provided in May and June 2017 invoiced in the following months) cleaning of the Common Parts (3) Insurance Rent and (4) sinking fund contribution. The legal fees and interest demanded in the 1 September 2017 invoice are not for services and are demanded only of the Tenant of Flat 2A. They are therefore not service charges. In so far as these items are concerned the Tribunal is content to treat the Landlord's Application as including an application the Tribunal under paragraph 5 of Schedule 11 to the 2002 Act for a determination as to the payability of an administration charge or charges.
38. The first issue for the Tribunal is whether the charges, totaling, £380.82, in the invoices of 1 June, 1 July and 1 August 2017, are payable by the Tenant and if they are by when they are payable. By clause 2 of Schedule 4 to the Lease the Tenant has covenanted "To pay to the Landlord the Service Charge demanded by the Landlord under paragraph 4 of Schedule 6 by the date specified in the Landlord's notice." As noted above the invoices did not specify any such date, despite Omnia's letters of 2 and 18 August 2017 to the tenant referring to payment by "the due date" and the requirement in paragraph 4.2 of the Sixth Schedule to the Lease. In these circumstances the Tribunal considers that a reasonable time on which a service charge payment would be considered to have become payable (what Omnia refer to as the due date) would be not later than 7 days after receipt of the invoice.
39. There was also disagreement between the parties as to the appropriate method of payment. The Landlords and their solicitors persistently informed the Tenant that the Lease provided that the only permitted method was that specified by the Landlord, viz: payment directly to the Landlord's account. They rely on Clause 1.1 of Schedule 4 to the Lease. This is a covenant by the Tenant "To pay the Rent to the Landlord in advance on or before the Rent Payment Date by standing order or by any other method that the Landlord from time to time requires by giving notice to the tenant." The Rent Payment date is defined as 25 March each year.
40. The Tribunal finds that this clause is on its plain wording confined to the Rent as defined in the Lease and does not extend to the Service

Charge. Furthermore, in his email of 10 July 2017 to Ms. Baker, Mr. Whipp stated that “if your internet banking is not working there is telephone banking or if a cheque is your preferred method it will need to be paid directly into the bank with the details on the bottom of every invoice sent to you.” Mr. Whipp said this would need to be done “promptly on receipt of the invoice as it needs to be cleared funds and a cheque usually takes 5 working days.” Thus the Landlord was prepared to accept payment into the Landlord’s account by cheque. As stated above the Tenant made several attempts to pay most of the outstanding charges. First she left a cheque each month at the Management Company’s address for £100. Second she sent those cheques, which were uncollected, to the Landlord. Third she transferred £340 direct to the Landlord’s account. The Landlord rejected all these proffered payments.

41. Finally although as explained above, she prevaricated in making full payment, Ms. Baker eventually transferred £381 to the Landlord’s nominated account on 8 September 2017. This was sufficient to cover in total the invoiced sum of £380.82 contained in the invoices of June, July and August. The Landlord’s application to the Tribunal was dated 11 September 2017 and received on 13 September 2017. The Landlord returned the 8 September payment because he said that the 1 September invoice had not been paid and therefore the sums received were not for the full cumulative amount owed at that time. It is not clear why the Landlords did not accept this full payment of the invoices for June, July and August 2017, leaving them free to pursue a claim for the September charges only.
42. Nevertheless, subject to compliance with the statutory requirements discussed below, the sums invoiced in June, July and August 2017 are therefore clearly still payable as are the service charges in the September 1 2017 invoice. The only qualification that the Tribunal would make is that the Tenant is only liable for 50% of the electricity charges relating to the Common Parts. It is not clear whether the sums demanded in the invoices are for 50% or 100% of those charges.
43. The statutory requirements referred to above are as follows.

Section 21B of the landlord and Tenant Act 1985 provides

21B Notice to accompany demands for service charges

(1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.

(2) The Secretary of State 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 a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.

(4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.

(5) Regulations under subsection (2) may make different provision for different purposes.

(6) Regulations under subsection (2) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

44. The relevant regulations, which contain the form that the notice must take, are The Service Charges (Summary of Rights and Obligations and Transitional Provision) (England) Regulations 2007.
45. The Landlords and their solicitors concede that section 21B of the 1985 Act was not complied with in relation to any service charge demand made before 1 February 2018. (The Tribunal raised the issue with them in January 2018). In a letter to the Tribunal dated 26 March 2018 Omnia state, "Given that the Tenant claims to be an experienced property professional over many years and her letter of November 15th 2017 to Omnia solicitors (enclosed with her latest statement) refer to her rights as a Tenant, the Landlord feels that she was aware of her rights afforded to her as a Tenant."
46. Whilst it might seem harsh to the Landlords, section 21B makes it clear that a service charge demand *must* be accompanied by the prescribed summary. No exception is provided for, based on the Tenant's actual or presumed knowledge of her rights.
47. It follows that the service charges contained in the invoices of June, July, August and September 2017 if not paid only become payable from the point at which the matter is rectified by service of a fresh demand and notice. Until that point the Landlord cannot enforce payment of the service charge because the Tenant is entitled to withhold payment. Furthermore, no interest charges are payable for the period during which there was non-compliance with section 21B.
48. This leads to the matter of the disputed administration charges. Clause 7 of Schedule 4 to the Lease contains a covenant "To pay to the Landlord on demand the costs and expenses (including any solicitors' surveyors or other professionals' fees, costs and expenses and any VAT on them) assessed on a full indemnity basis incurred by the Landlord (both during and after the end of the Term) in connection with or in contemplation of any of the following
 - (a) the enforcement of any of the Tenant Covenants;
 - (b) preparing and serving any notice in connection with this lease under section 146 or 147 of the Law of Property Act 1925 or taking any proceedings either of those sections notwithstanding that forfeiture is avoided otherwise than by relief granted by the court;

- (c) preparing and serving any notice in connection with this lease under section 17 of the Landlord and Tenant (Covenants) Act 1995;
 - (d) preparing and serving any notice under paragraph 4(c) of Schedule 3; or
 - (e) any consent applied for under this lease, whether or not it is granted.
49. The Landlord argues that the cost of the work carried out by their solicitors from 1 August 2017 was an expense incurred in connection with or in contemplation of the enforcement of any of the Tenant Covenants and therefore recoverable as such under clause 7. Paragraph 1(1) of Schedule 11 to the 2002 Act defines an “administration charge” as “an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable directly or indirectly.....(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.” Thus the sums claimed as an administration charge clearly fall within paras. (c) and (d) of this definition.
50. Paragraph 5(1) of Schedule 11 provides that “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 to whom it is payable (b) the person by 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.” Paragraph 5(2) provides that subsection (1) applies whether or not the payment has been made.
51. Paragraph 2 of the same Schedule provides that a variable administration charge is payable only to the extent that it is reasonable. Paragraph 1(1) provides that an administration charge is variable if it is neither specified in the lease nor calculated in accordance with a formula specified in the lease. Thus the sums claimed in this case are a variable administration charge.
52. Paragraph 4 of the Schedule provides that
- “(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.”

The form and content of the statutory notice are set out in the Administration Charges (Summary of Rights and Obligations) (England) Regulations 2007.

53. The Landlords and their solicitors concede that paragraph 4 of Schedule 11 to the 2002 Act was not complied with in relation to the administration charge demand of 1 September 2017. They say that this should not prejudice the Landlord because “the tenant was aware of her rights under 2002 Act, as evidenced in her letter dated 15.11. 2017 (paragraph 1), a copy of which is enclosed for convenience, requesting an application under paragraph 5A schedule 11 to the 2002 Act to extinguish her liability to pay ‘an administration charges in respect of litigation costs.’
54. Nevertheless, paragraph 4(1) of Schedule 11 to the 2002 Act says that the required notice *must* accompany a demand and there is no exception to that requirement. Thus until that matter is rectified the administration charge demand is not payable because that is what is paragraph 4 provides. However, this does not prevent the Tribunal from considering the Applications made by both Landlord and Tenant under the 2002 Act.
55. The issue then becomes one of whether the expenses claimed were incurred “in connection with or in contemplation of the enforcement of the Tenant Covenants.” All of the letters from Omnia to the Tenant dated 25, 29 and 31 August 2017, refer to an intended application to the Tribunal for “forfeiture and possession proceedings.” It is of course the case that the Tribunal does not deal with possession proceedings. However, section 81 of the Housing Act 1996 provides that “a landlord of a dwelling may not take forfeiture proceedings for non-payment of a service charge or an administration charge unless
 - (a) it is finally determined by (or on appeal from) [the appropriate tribunal] or by a court, or by an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, that the amount of the service charge or administration charge is payable by him, or
 - (b) the tenant has admitted that it is so payable.”

Thus an application to the Tribunal is a pre-requisite to such action.

56. So is the administration charge payable? The short answer is that because the service charges demanded were not payable, for want of compliance with section 21B of the 1985 Act, the Tenant was not in breach of covenant in withholding payment. It follows that any legal expenses incurred by the Landlord in proceedings before the Tribunal were not incurred “in connection with or in contemplation of the enforcement of the Tenant Covenants and therefore those expenses are not recoverable under clause 7 of the Fourth Schedule of the Lease.

57. It follows further that in so far as the sums demanded were not payable by the Tenant the Tribunal is willing, to make orders under section 20C of the 1985 Act and under paragraph 5A of Schedule 11 to the 2002 Act that none of the costs incurred by the Landlord in connection with the proceedings before the Tribunal are recoverable from the tenant by way of service charge or administration charge.
58. Had there been a breach of covenant, the issue of whether the charges demanded were reasonable and the extent to which they related to the breach or alleged breach would need to have been addressed. In the light of the Tribunal's finding this has not been necessary. Nevertheless, the Tribunal wishes to make some observations in relation thereto.
59. The first point is that the matter is complicated by the fact that the Landlord was employing Omnia not just to take enforcement action but also to deal with queries raised by the Tenant about the property. These are matters which one would expect the Landlords to be able to address themselves. The second point is that each time any such queries were dealt with by the solicitors, they issued warnings as to possible or intended enforcement action. One might argue that these were giving further indulgence to the Tenant but they were also increasing the costs far beyond the sums in issue. The warnings were given in letters to the Tenant dated 2, 11, 18, 24, 25, 29 and 31 August and 1 September 2017 and in an email of 7 September 2017. This seems to the Tribunal to have been a disproportionate duplication of effort.
60. None of the Tribunal's determinations should be taken as implying that Ms. Baker has behaved properly throughout or that the Landlords have otherwise behaved improperly in their dealings with Ms. Baker. Ms. Baker's queries were dealt with in a polite and patient manner by the Landlords who had been bombarded with many communications, seemingly at all hours of day and night and this is to be deprecated. It is a sad state of affairs that both parties have prolonged this whole matter for so long. Indeed communications between the parties have proved to be a challenge. On 8 September 2017 Ms. Baker emailed Omnia and asked that all further communications to her should be by letter rather than by email. Ms. Baker says that nevertheless letters have been sent to the Property despite the fact that the Landlord was aware that she did not live there and that she had given them an alternative address. The Landlords say that when they have sent letters to that address by recorded delivery they have not been signed for. Ms Baker says that she was not there when they were delivered and she had not asked for letters to her to require a signature for receipt. When the Landlords have sent letters instead to the Property they have also been returned unsigned for. These miscommunications have all played a part in prolonging the dispute.

61. Indeed no satisfactory consensual resolution was in sight at the date of this determination. The Landlord issued (non-section 21B notice compliant) service charge demands dated 5 October, 3 November and 15 December 2017. A statement of 18 December 2017 requested payment of the invoices for June to November 2017 inclusive, together with late payment interest on the June to October invoices. The statement also demanded payment of legal fees in respect of three invoices issued to the Landlords by Omnia. The first was for £1,342.68 being the fees disputed in the present Applications. The second was for £727.90 in respect of services rendered between 2 September and 24 October 2017 and the third for £628.06 in respect of services rendered between 25 October 2017 and 18 December 2017. Payment of some of the service charge invoices were made by Ms. Baker but returned by the Landlord on the basis that she had not settled all outstanding invoice charges. All the letters from Omnia to Ms. Baker were addressed to her at the Property.
62. Whilst the charges levied post-1 September 2017 are not the subject matter of the present Applications, any of the subsequent legal costs that relate to the current proceedings are covered by the Orders made by the Tribunal in the present case.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional Office, which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, that person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Martin Davey
Chairman
16 April 2018

Annex: The relevant statute law other than as set out in the reasons

Landlord and Tenant Act 1985

Section 18(1) defines a “service charge” as:

“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.”

Section 19(1) provides that:

“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 provision 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”.

“Relevant costs” are defined for these purposes by **section 18(2)** of the 1985 Act as “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.

Section 27A provides

(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.

Section 20C provides

- (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 the First-tier Tribunal are not to be regarded as relevant costs to be taken into account when determining the amount of service charge payable by the tenant or any other person or persons specified in the application.

.....

- (4) the 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

Paragraph 5A of Schedule 11 provides that

- (1) A tenant of a dwelling in England make apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs
- (2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable
- (3) In this paragraph
 - (a) "litigation costs" means costs incurred, or to be incurred, by the landlord in connection with proceedings of the kind mentioned in the table and
 - (b) "the relevant court or tribunal" means the court or tribunal mentioned in the table in relation to these proceedings

Proceedings to which costs relate	"the relevant court or tribunal"
Court proceedings	The court before which the proceedings are taking place or, if the application is made after proceedings are concluded, the county court
First-tier Tribunal proceedings	The First-tier Tribunal
Upper Tribunal proceedings	The Upper Tribunal
Arbitration proceedings	The arbitral tribunal or, if the application is made after the proceedings are concluded, the county court