FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/37UC/LLD/2019/0004**
Property	**:**	**149 Mill Bridge Close, Retford, Nottinghamshire DN22 6FE**
Applicant	**:**	**Vincent Grayson**
Representative	**:**	**None**
Respondent	**:**	**E & J Ground Rents Number 3 Limited**
Representative	**:**	**Eyre & Johnson Limited**
Type of Application	**:**	**Applications under Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"), section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act"), paragraph 5A of Schedule 11 of the 2002 Act, and Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal Members	**:**	**Judge C Goodall** **Mr C Gell FRICS**
Date of Decision	**:**	**16 April 2019**

DECISION

Background

1. The Applicant is the current tenant of the Property (called the Demised Premises in the lease) under a lease dated 22 December 2006. The term is 999 years. The Respondent is the current landlord.

2. In clause 3 of the lease, the lessee covenants to observe and perform the obligations contained in (inter alia) the fourth schedule of the lease.

3. Paragraph 17.4 of the Fourth Schedule contains a covenant ("the Covenant"):

   "To give to the Landlord and the Management Company notice of every dealing with or underletting or transmission of the legal estate in the Demised Premises … within twenty one days after the same shall occur and to pay to each of the Landlord and the Management Company such reasonable registration fees as the Landlord and the Management Company shall from time to time determine"

4. Currently, management of the development in which the Property is situated is undertaken by the Respondent's agent, E & J Estates. They had requested that the Applicant provide information to them about the Property on a Property Information Form. On 2 November 2018, the Applicant returned the form, on which he informed E & J Estates that the Property was sub-let. In consequence, E & J Estates (eventually) sent the Applicant an invoice for a "Notice to Sublet Fee" for the sum of £75.00 plus VAT (total £90.00) ("the Fee") dated 23 November 2018.

5. On 30 November 2018 the Applicant gave formal notice of a subletting of the Property on the form E & J Estates had provided for completion.

6. On 28 January 2019, the Applicant commenced these proceedings, asking that the Tribunal determine that the Fee is an unreasonable administration charge, or alternatively that it is a service charge which has been unreasonably incurred, and that the Tribunal should reduce it to £25 plus VAT. He also asked that the Tribunal make an order that:

   a. none of the costs incurred by the Respondent in these proceedings should be charged to him through the service charge under section 20C of the Landlord and Tenant Act 1985 ("the section 20C application"),

   b. that any liability he may have to pay the Respondent's litigation costs directly be extinguished under paragraph 5A of Schedule 11 of the 2002 Act ("the paragraph 5A application"), and

   c. that the Respondent should pay his costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rule 13 application").

7. Both parties consented to a determination by the Tribunal on consideration of the papers and without a hearing. The Tribunal has carefully considered the submissions of the Applicant dated 28 January 2019 and of the Respondent dated 5 March 2019, and we met on 11 April 2019 to make this determination.

Determination

8. The first question to consider is whether the Fee is an administration charge. If it is, it is only payable to the extent that it is reasonable (paragraph 2 of Schedule 11). The Tribunal has jurisdiction to determine the amount that is then payable under paragraph 5 of Schedule 11.

9. Under paragraph 1(1) of Schedule 11, an administration charge is 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.

10. The Covenant is not a clause which requires the Applicant to seek approval to sub-let. It is purely a fee to register any transaction listed within it. It cannot fall within paragraph 1(1)(a) of Schedule 11. There is authority on this point in paragraph 22 of *Proxima GR Properties Ltd v McGhee [2014] UKUT 0059(LC)* where the Deputy President of the Upper Tribunal stated:

    "22. 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."

11. Neither, in the Tribunals view, does the Covenant fall under sub-clause (b) of paragraph 1(1). The Applicant has argued that this sub-section applies because the Respondent uses the information contained in a notice of sub-letting to create records that might be passed to the fire authorities in the event of fire, and for obtaining insurance quotations. The Tribunal rejects

this argument. The Fee is charged for registering the sub-letting. If the Respondent then uses the information it collects from registration to carry out its responsibilities of management, this is a by-product of compliance with the Covenant; it is not the purpose of the Covenant. The Fee is not payable for the provision of information by the Respondent to others; it is for the recording of the transaction.

12. It is clear on the facts that neither of sub-clauses (c) and (d) of paragraph 1(1) are applicable.

13. The Tribunal determines that the amount payable for the Fee is not an administration charge. It therefore has no jurisdiction to consider the Fee under Schedule 11 of the 2002 Act.

14. The next question to consider is whether the Fee is a service charge, and thus amenable to consideration of whether it has been reasonably incurred under section 19 of the 1985 Act.

15. Under section 18(1) of the 1985 Act, a service charge is 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."

16. In the Tribunal's view, the Fee is not payable for any of the list of items contained in paragraph (a) of section 18(1). On its face, it is a straightforward fee for registering a transaction entered into by the Applicant. It is not a fee for management of the development. It is not a service charge.

17. The Tribunal's conclusion is that the Fee is neither an administration charge nor a cost which could be included within a service charge. We therefore have no jurisdiction to make any adjustment to it, as had been requested by the Applicant. The application is dismissed.

18. For completeness we make three further points. Firstly, the Applicant's argument relating to the Unfair Terms in Consumer Contracts Regulations 1999 is not an argument we can consider as we have no jurisdiction to consider the Fee. This should be argued before a court, if the Applicant wishes to pursue it.

19. Secondly, the Respondent is not entitled to demand whatever sum it likes under the Covenant. There is a contractual restriction requiring that the fee be reasonable, which can be argued before a court, should the Applicant consider his case has enough merit.

20. Thirdly, should we be wrong on the jurisdiction points we have determined, we have to say that we would have found the Fee, though certainly at the higher end of the scale, would have been reasonable in any event.

Costs

21. We can deal fairly simply with the three costs application, being the section 20C application, the paragraph 5A application, and the Rule 13 application.

22. The first two provisions are protective orders designed to prevent the Respondent from levying charges which the Tribunal does not consider it would be just and equitable for the Applicant to pay. The costs incurred in this Tribunal are generally not recoverable anyway as this is not a costs-shifting jurisdiction. The need for section 20C and paragraph 5A arises should the Respondent claim that it is entitled to recover costs via a clause in the lease – whether through the service charge, or directly from the Applicant.

23. The Tribunal therefore has to consider whether it would be just and equitable to protect the Applicant from any contractual claims for costs in the future. At this stage, it has no idea whether any such claim will be made, and has not considered whether, should one be made, there is appropriate authority in the lease for it. But the "just and equitable" test goes both ways; it may be unjust and inequitable to deprive the Respondent of a contractual right, just as it might be just and equitable on occasions to protect a lessee against the enforcement of such a right.

24. The outcome of the proceedings are relevant when considering whether it would be just and equitable to deprive the Respondent of a contractual right to recovery of costs, and the Tribunal has to bear in mind that the Applicant has failed to persuade the Tribunal to make a determination in his favour.

25. After consideration, the Tribunal's view is that it would not be just and equitable to make any order in the Applicant's favour under section 20C or paragraph 5A at this point, and before it is known if the Respondent will seek to charge costs to the Applicant. These applications are refused.

26. If litigation costs for this case are included in a service charge demand in the future, the Tribunal determination in the previous paragraph means that the Applicant has been refused an order saying that any costs of this case cannot be specifically included within his service charge bill. But he retains a right to challenge the legality of including that charge within the service charge at all, and its reasonableness, under section 27A of the 1985 Act. This decision should not be construed as an invitation for the Respondent to include its costs of these proceedings within the service

charge, for the Tribunal has not considered whether that would be permissible.

27. With regard to the paragraph 5A application, our determination in paragraph 25 above should be taken as being a refusal to order that the Respondent's right to costs under the lease for this case (should it have that right, which we have not considered) should be extinguished. But should the Respondent levy an invoice for litigation costs to the Applicant under a contractual clause in the future, he would, in this Tribunal's view, still be entitled to seek an order reducing (but not extinguishing) those costs under paragraph 5A. The paragraph 5A application in respect of reducing costs is in a sense premature as the Tribunal cannot determine now whether to reduce the Applicant's liability for litigation costs until it knows what those costs might be.

28. So far as the claim for costs under Rule 13 is concerned, this can only be ordered by the Tribunal if the Respondent has behaved unreasonably in the defence of or in the conduct of the proceedings. Here, the Respondent has successfully defended the claim, and there is no hint of any part of its conduct which could be said to be unreasonable. This claim is dismissed.

Appeal

29. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)