FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00ML/LIS/2018/0033
Property	**:**	2B Sussex Heights, St Margarets Place, Brighton BN1 2PQ
Applicant	**:**	Sussex Heights (Brighton) Limited
Representative	**:**	Mr Tom Morris, Counsel
Respondent	**:**	Mrs Marie Martin
Representative	**:**	Miss T Martin
Type of Application	**:**	Determination of service charges/administration charges
Tribunal Members	**:**	Judge E Morrison Judge A Lock Mr R A Wilkey FRICS
Date of decision	**:**	18 January 2019
Date of written reasons	**:**	24 January 2019

WRITTEN REASONS

The application and procedural background

1. On 31 January 2018 the Applicant lessor issued proceedings in the county court against the Respondent lessee claiming arrears of service charges and ground rent in the principal sum of £3711.10, interest and contractual costs.

2. On 15 January 2018 the Respondent filed an admission as to £2928.10 of the arrears, and a defence as to the balance of £762.31. A cheque was tendered to the Applicant for the sum admitted.

3. By orders in the county court dated 11 May 2018 and 6 August 2018 the claim was allocated to the small claims track, the issue of the service charges was transferred to the Tribunal for determination, and the remaining issues (which fall outside the jurisdiction of the Tribunal) were transferred to a tribunal judge sitting as a judge of the county court.

4. On 19 September 2018 a tribunal judge gave directions. The Respondent's statement of case provided subsequently included an application for an order under section 20C of the Landlord and Tenant Act 1985. This application, and a further oral application made at the hearing under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, was dealt with by the tribunal judge sitting as a county court judge.

5. The only issue before the full Tribunal for determination was the payability and reasonableness of the disputed service charges in the sum of £762.31. After hearing the evidence and submissions, the Tribunal delivered its decision orally to the parties on 18 January 2019. This document provides the written reasons for that decision. A separate written order of the county court, recording the decisions of the tribunal judge on the county court issues, also given orally at the end of the hearing, will be issued.

The nature of the dispute

6. Although the claim was principally for service charge arrears, the Respondent did not in fact dispute the payability or reasonableness of any of the service charges (or indeed the ground rent arrears). The dispute arose only because part of the most recent pre-issue payment made by the Respondent, on about 27 June 2017, had been applied by the Applicant's managing agents not against the outstanding service charges, but against claimed administration charges in the total sum of £783.00. This credit against the administration charges resulted in a shortfall of £762.31 against the service charge. The Respondent disputed the validity of those administration charges. Thus, in reality, the dispute before the Tribunal related to administration charges not service charges.

The law and jurisdiction

7. An "administration charge" is defined in paragraph 1 of the Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"). It includes an amount payable by a tenant of a dwelling in respect of the tenant's failure to pay rent or service charges when due, or on connection with an alleged breach of covenant.

8. Under paragraph 2 of Schedule 11 a variable administration charge is payable only to the extent it is reasonable.

9. Paragraphs 5 and 6 of Schedule 11 confer jurisdiction on the First-tier Tribunal to determine whether an administration charge is payable and if it is, by whom and to who, when, how much, and how it should be paid.

The lease

10. The Tribunal had before it a copy of the lease of the property dated 21 March 1970. The only provision relied on by the Applicant to justify the administration charges was clause 3.14, a covenant by the lessee in the following terms:

    To pay all costs charges and expenses (including legal costs and fees payable to the Lessor's Surveyor) incurred by the Lessor in or in contemplation of any proceedings under section 146 and 147 of the Law of Property Act 1925 in respect of the demised premises notwithstanding forfeiture is avoided otherwise than by relief granted by the Court and also to pay all costs charges and expenses incurred by the Lessor in relation to the preparation and service of a Schedule of Dilapidations at the expiration or sooner determination of the term hereby granted (including legal costs and fees payable to the Lessor's Surveyor).

The administration charges

11. The bundle contained a number of statements of account, sent to the Respondent on various dates, itemising outstanding charges. There were ten separate charges which together total £783.00, with stated due dates falling between 9 January 2013 and 9 December 2016. However the Applicant conceded at the hearing that the first demand in respect of these charges which satisfied statutory requirements (by providing a summary of rights and obligations, and the lessor's address) was dated 23 February 2017.

12. The ten charges fell into two categories. Seven of the charges raised by the managing agents for their costs of sending the Respondent letters about her arrears and a "solicitors referral fee". These charges totalled £258.00. The three remaining charges related to fees of Dean Wilson LLP, solicitors, totalling £525.00.

13. At the outset of presenting the Applicant's case, Mr Morris informed the Tribunal that the Applicant in fact had no obligation to pay the managing agents for the work represented by their seven charges. The arrangement between the Applicant and the managing agents was that the agents would seek to recoup their outlay from the lessee. He therefore conceded that as none of those charges had been "incurred by the Lessor" they could not fall within clause 3.14 of the lease, and there was accordingly no basis for the Applicant to seek to recover those charges from the Respondent.

14. This left only the three solicitors' charges for consideration.

The Applicant's case

15. The Applicant called no witnesses, but relied on the submissions set out in its solicitors' written response to the Respondent's defence, and the supporting documentation consisting of Dean Wilson's letters to the Respondent, and their invoices rendered to the Applicant. Its position was that Dean Wilson had been instructed on at least three occasions due to the Respondent having service charge arrears. The work carried out by Dean Wilson, and charged for, fell within scope of clause 3.14 of the lease, because it was carried out in contemplation of forfeiture.

16. In particular the Applicant relied on wording which appeared in the final paragraph of the initial (standard) letter sent to the Respondent by Dean Wilson each time they were instructed: "Please ensure that we receive settlement of the sum due within 7 days, failing which we anticipate instructions to issue proceedings with a view to forfeiture without any further reference to yourself". A standard second letter noted that "your mortgage lender has now been contacted regarding the arrears as this affects their security".

17. The Applicant accepted that, on each occasion, the arrears had subsequently been cleared by the Respondent, before the next half-yearly service charge was demanded.

18. The Applicant also contended that Dean Wilson's fees, of £183.00 in 2013, £123.00 in May 2014, and £219.00 in October 2015, were reasonable. The solicitors time-sheets were produced which contained a list of tasks carried out, and showed that their charges were in a lower sum than the time-sheets indicated was billable.

The Respondent's case

19. The Respondent was represented at the hearing by her daughter, but provided some brief oral evidence herself. Her case was that the Dean Wilson charges did not fall within clause 3.14 of the lease.

20. The Respondent said that since buying her flat in 2000 until 2012 she had always paid her service charges on time. In 2012 the Applicant had increased the service charge by £1800.00 per annum in order to

build up a reserve to pay for planned major works, which have not yet commenced. This increase caused her financial difficulty and she did not always pay on time. She told the Tribunal that when she had received communications from the managing agents, she had telephoned them asking for time to pay, which request was rejected. She had never refused to pay any of the charges and, until 2017, had always managed to clear one half yearly demand before the next half yearly demand was made.

21. It was submitted on her behalf that there was no evidence that the Applicant was contemplating forfeiture at the time the Dean Wilson charges were incurred. The reference to forfeiture in the Dean Wilson letters did not establish this. A solicitor could not contemplate forfeiture unless he had been instructed to do so. There was no evidence of the Applicant's instructions beyond a desire to collect the arrears. It was possible that, if Dean Wilson had requested instructions, the Applicant – a lessee- owned company - would not at that stage have contemplated forfeiture of a lease where the lessor had paid on time for twelve years, and was now still paying, despite the significant increase in charges, albeit a few months late.

22. Ms Martin also queried whether there had been any waiver of the right to forfeit in that the Applicant had continued to demand rent and service charges.

23. Finally the Respondent contended that the amount of the charges was not reasonable because the charges were not reasonably incurred. It was not reasonable to instruct solicitors in circumstances where the Respondent was trying to pay. Moreover the demands sent to the Respondent contained no detail whatsoever regarding the charges, just stating the sum to be paid, which meant the Respondent could not even assess whether the demand was reasonable. The amount of the charges was also too high as the letters sent were in standard form.

Discussion and determination

24. In *Barrett v Robinson* [2014] UKUT 0322 (LC) the Upper Tribunal considered whether legal costs incurred by a lessor in obtaining a determination of a service charge could be recovered from the lessee pursuant to a clause with relevant wording effectively the same as that in clause 3.14 of the Respondent's lease. Although a determination was a pre-requisite to serving a notice under section 146 of the Law of Property Act 1925, it was held that

For costs to be recoverable … a landlord must show that they were incurred in or in contemplation of proceedings, or the preparation of a notice, under section 146 … A landlord may or may not commence proceedings … with a view to forfeiture; a landlord may simply wish to receive payment of the sum due, without any desire to terminate the tenant's lease, or may not have thought far enough ahead to have

reached the stage of considering what steps to take if the tenant fails to pay after a … determination has been obtained - [51].

25. In the present case, the charges do not relate to proceedings, as matters never got that far. The only evidence which assists the Applicant is the mention of forfeiture, and of the mortgagee's security being affected, in Dean Wilson's letters to the Respondent. At first glance, this might appear to be sufficient to bring the charges within the scope of clause 3.14, but upon closer examination, and in the circumstances of this case, the Tribunal is not satisfied that it does so, for the reasons which follow.

- The wording of the initial letters sent by Dean Wilson acknowledges that instructions to issue proceedings with a view to forfeiture have not yet been received from the Applicant.
- The fact that solicitors may "anticipate" receiving such instructions does not mean that such instructions were ever received.
- The fact that the follow-up letters to the Respondent do not match the anticipated "instructions to issue proceedings with a view to forfeiture without any further reference to yourself" points to the conclusion that such instructions were not received.
- The statement of case prepared by Dean Wilson in this case states only that "Dean Wilson LLP were instructed … to recover the arrears". There is no mention of forfeiture.
- The suggestion that the Applicant might well have been reluctant to consider forfeiture against a lessee who had, while not perfect, a reasonable track record with regard to payment, was not contradicted by the Applicant
- The Applicant produced no evidence at all as regards their intentions at the relevant periods, despite two directors of the Applicant and two representatives' of the managing agents attending the hearing. Had the Applicant been contemplating forfeiture, it should have been straightforward to adduce evidence about this, but none was forthcoming.

26. The Tribunal therefore finds that none of the administration charges are recoverable under the lease and are not payable by the Respondent.

27. For the sake of completeness, there was no evidence that the Applicant had waived their right to forfeit in respect of the outstanding service charge arrears each time Dean Wilson were instructed. On each occasion the arrears related only to the current service charge period, before any further demand had been made.

28. Had the solicitors charges been payable under the lease, the Tribunal would have found that the charges were reasonable in amount, being reasonably incurred and not excessive given the work done as shown by the time-sheets.

29. The result of our finding that the administration charges are not payable, so that the Respondent has wholly succeeded in respect of the disputed sum of £762.31, is reflected in the separate order made by the tribunal judge sitting as a judge of the county court.

Dated: 24 January 2019

Judge E Morrison

Appeals

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, the 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.