



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

Case reference : **LON/00AY/LSC/2018/0072**

Property : **1 Glendon Apartments, 69 Gipsy Road, London SE27 9QS**

Applicant : **Miss Victoria McNaught-Davis**

Respondent : **RG Securities (No 2) Limited**

Type of application : **For the determination of the reasonableness of and the liability to pay administration charges**

Tribunal member : **Judge P Korn**

Date of decision : **6th June 2018**

DECISION

Decisions of the Tribunal

- (1) The contested administration charges are not payable at all.
- (2) The Tribunal hereby makes an order under section 20C of the Landlord and Tenant Act 1985 that none of the costs incurred by the Respondent in connection with these proceedings may be added to the service charge.
- (3) The Tribunal hereby makes an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 extinguishing the liability that the Applicant might otherwise have incurred to pay the Respondent's litigation costs in connection with these proceedings.

The application

1. The Applicant seeks a determination pursuant to Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("**the 2002 Act**") as to the payability of certain administration charges sought by the Respondent.
2. The items challenged by the Applicant are stated to total £890.00. They comprise late payment administration fees and debt recovery fees and relate to the years 2016 to 2018.
3. The relevant statutory provisions are set out in the Appendix to this decision. The Applicant's lease ("**the Lease**") is dated 27th January 2015 and was originally made between QNewHomes Ltd (1) and the Applicant (2).

Paper determination

4. In its directions the Tribunal stated that the application was to be determined without a hearing unless either party requested a hearing prior to the determination. No such request has been made, and accordingly the application is being determined on the papers alone without a hearing.

The background

5. The Property comprises a one bedroom flat within a purpose-built block. The Respondent has levied certain administration charges in connection with the alleged late payment of service charges by the Applicant, and it is these administration charges which are being challenged.

Applicant's case

6. The Applicant submits that there is no provision in the Lease allowing the Respondent to recover the contested charges. The Applicant notes that the Respondent seeks to rely on clause 4(r) of the Lease, but she submits that the interpretation of that clause is at best ambiguous.
7. The Applicant also submits that the contested charges are not reasonable and proper because in her view they are arbitrary. They are unsubstantiated by any evidence that they relate to actual costs incurred by the Respondent in respect of overdue service charges, and they form part of a standard fee structure applied to all leaseholders.
8. On 29th December 2017 the Applicant made an overpayment of £139.67 in error. On 26th February 2018 the Respondent's managing agents then issued an identical charge as 'Fees for Debt Recovery' without having previously issued a request for payment of the debt to which it allegedly related. There is no evidence of the relevant cost actually having been incurred prior to the date that the amount of £139.67 was paid by the Applicant in error, nor is there any evidence of its being a real cost.
9. Charges are repeated on numerous occasions at random. For example, there was ongoing correspondence as to the reasonableness of certain service charges and then the Applicant was charged twice for £120.00 and once for £139.67 with no explanation as to how these charges had arisen.
10. In addition, the correspondence provided by the Respondent in the disclosure bundle contains no accompanying summary of tenants' rights and obligations.

Respondent's position

11. The Respondent has set out clause 4(r) of the Lease in full and argues that the clause fully covers the contested charges in this case. The Respondent states that its managing agents charge nominal administration fees in respect of work done and in respect of time taken in enforcing the tenant's covenants in the Lease. The charges in this case were properly demanded and were accompanied by a summary of tenants' rights and obligations.
12. The Respondent also states that it is necessary for initial reminder letters and formal letters before action to be issued before it can issue any proceedings and that therefore these steps are all necessary steps which are incidental to the preparation and service of a notice pursuant to section 146 of the Law of Property Act 1925. Clause 4(r) provides for the recovery of such costs.

13. As regards the relevant case law, the Respondent states that the Court of Appeal in *Freeholders of 69 Marina v Oram & Ghoorun (2011) EWCA Civ 1258* held that the cost of seeking a determination of the Court or Tribunal is recoverable under such a lease clause, as it constitutes a necessary step in contemplation of the service of a notice pursuant to section 146. In *Church Commissioners for England v Ibrahim and Another (1997) 1 EGLR 13* the Court of Appeal considered a contractual costs clause, and in the Respondent's submission the Court of Appeal's decision in that case is authority for the proposition that if a lease contains a costs recovery clause the Court or Tribunal can and should award costs in line with that clause irrespective of any fixed costs regime. The Respondent has also referred to the Court of Appeal decision in *Chaplain Limited v Kumari (2015) EWCA Civ 798* as authority for the proposition that the fact that a claim is a small claim does not restrict the Court or Tribunal in awarding costs which are contractually due.
14. In the light of the above authorities and arguments the Respondent submits that it has an unimpeachable contractual entitlement to its costs incurred in pursuit of unpaid service charges, and it comments that the phrase "to pay all" in clause 4(r) of the Lease imports a liability to pay the costs on an indemnity basis. The Respondent adds that it is unfortunate that the Applicant did not pay the relevant charges before the due dates. The Respondent has provided a statement of account which it states shows that the Applicant's payments have often been late and sporadic.

Tribunal's analysis

15. The contested charges are "administration charges" within the meaning of paragraph 1(1) of Schedule 11 to the 2002 Act, as the basis on which they have been charged is that they are amounts payable by the tenant in addition to the rent in respect of a failure to make a payment by the due date to the landlord. They are also **variable** administration charges within the meaning of paragraph 1(3) of Schedule 11 to the 2002 Act because the amount of the charges is neither specified in the Lease nor calculated in accordance with a formula specified in the Lease.
16. Under paragraph 2 of Schedule 11 to the 2002 Act, variable administration charges are only payable to the extent that the amount is reasonable. Under paragraph 4 of Schedule 11, a demand for the payment of an administration charge must be accompanied by a summary of the rights and obligations of tenants. Under paragraph 5 of Schedule 11, an application can be made to the Tribunal for a determination as to whether an administration charge (whether variable or otherwise) is payable.

17. Dealing first with paragraph 4 of Schedule 11, the Applicant states that there is no summary of rights and obligations in the hearing bundle. However, the issue is whether the demands themselves were accompanied by a summary of rights and obligations when made, and the Respondent states that they were. In the absence of any other evidence on the point, I consider on the balance of probabilities that the demands were accompanied by a summary of rights and obligations.

18. Turning next to paragraph 2 and 5 of Schedule 11, the clause in the Lease on which the Respondent relies is clause 4(r) which reads as follows:

“[The Lessee hereby covenants with the Lessor] ... to pay all reasonable and proper costs charges and expenses (including Solicitors costs and Surveyors fees) incurred by the Lessor on a full indemnity basis of and incidental to the collection from the Lessee of any arrears of the annual rent any service charge any interim charge or any other payments due and of or incidental to the preparation and service of any Notice under Sections 146 and 147 of the Law of Property Act 1925 or incurred in or in contemplation of bona fide proceedings under Section 146 and 147 of that Act notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court”.

19. The Respondent states that the phrase “to pay all” in clause 4(r) of the Lease imports a liability to pay the costs on an indemnity basis, and yet that phrase is immediately followed by the words “reasonable and proper”, and therefore it would seem that the words “reasonable and proper” are intended to qualify the requirement “to pay all”. In seeking to argue that costs are payable on an indemnity basis the Respondent might have been better off referring to the words “on a full indemnity basis” which appear later on in clause 4(r), although there is then a possible tension between the phrases “reasonable and proper” and “on a full indemnity basis”.

20. From the information provided, it would seem that the contested charges fall into two distinct categories. Some would seem to relate to actual charges levied by third parties such as JB Leitch whilst others would seem to represent notional charges for time spent by the Respondent or its agents in chasing up alleged arrears. Clause 4(r) of the Lease limits the tenant’s covenant to paying costs, charges and expenses “incurred by the Lessor”, and there is at least a question as to whether the Respondent can be said to have incurred particular costs, charges or expenses if they have not had to pay money out to any third party. Neither party has brought any case law or other authority on this point.

21. However, I do not accept the Applicant’s argument that there is no provision in the Lease allowing the Respondent to recover costs

incurred in connection with the collection of service charges. In addition, I do not accept the Applicant's argument that the wording of clause 4(r) is generally ambiguous such that it cannot be relied upon by the Respondent to claim reasonable and proper costs, charges and expenses incurred by it of and incidental to the collection of arrears of service charge.

22. The Respondent has referred to three decisions of the Court of Appeal as authorities for the proposition that it has an unimpeachable contractual entitlement to its costs incurred in pursuit of unpaid service charges. Subject to the questions of whether the costs are "reasonable and proper", whether each of the relevant costs was "incurred" and whether the costs are in fact payable pursuant to the relevant provisions of Schedule 11 to the 2002 Act, and leaving to one side the use of the word "unimpeachable", this proposition is accepted in principle.
23. However, the Applicant has raised some substantive points on the questions of whether the contested charges are reasonable and whether they are payable. She states that the charges are arbitrary and are unsubstantiated by any evidence that they relate to actual costs incurred by the Respondent. She makes specific reference to an overpayment of £139.67 later being converted by the Respondent into a charge being levied for late payment without stating which late payment was being referred to or providing any supporting evidence that there was any overdue payment. She also states that charges are repeated on numerous occasions at random, giving the example of ongoing correspondence as to the reasonableness of certain service charges, following which the Applicant was charged twice for £120.00 and once for £139.67 with no explanation as to how these charges had arisen.
24. The Respondent's submissions simply do not address the Applicant's concerns adequately if at all. The thrust of the Respondent's submissions focuses on the theoretical legal basis for recovery, but the Respondent does not then go on to justify the actual charges or provide any evidence as to what each one relates to or to show that the Applicant failed to make the original payments to which the charges purportedly relate such that it might be arguable that the charges are reasonable and payable. The Respondent has provided a copy statement of account, but that statement by itself does not constitute evidence which can reasonably be treated as rebutting the points made by the Applicant.
25. The above conclusion applies to each of the contested charges and therefore none of them is reasonable and none of them is payable.

Costs

26. The Applicant has applied for an order under section 20C of the Landlord and Tenant Act 1985 that the costs incurred by the Respondent in connection with these proceedings are not to be added to the service charge. She has also applied for an order under paragraph 5A of Schedule 11 to the 2002 Act reducing or extinguishing her liability to pay the Respondent's litigation costs in connection with these proceedings.
27. The Applicant has been wholly successful on the substantive issues and the Respondent has not in my view properly grappled with the Applicant's actual concerns. The evidence indicates that the Applicant has acted reasonably in making and pursuing the application and I consider it just and equitable (i) to make an order under section 20C of the Landlord and Tenant Act 1985 that none of the costs incurred by the Respondent in connection with these proceedings may be added to the service charge and (ii) to make an order under paragraph 5A of Schedule 11 to the 2002 Act extinguishing any liability that the Applicant might otherwise have incurred to pay the Respondent's litigation costs in connection with these proceedings.

Name: Judge P Korn

Date: 6th June 2018

RIGHTS OF APPEAL

- A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.
- B. 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.
- C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
- D. 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.

APPENDIX

Appendix of relevant legislation

Commonhold and Leasehold Reform Act 2002

Schedule 11

Paragraph 1

- (1) In this part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly ...
 - (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) *[Not relevant]*
- (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.

Paragraph 2

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

Paragraph 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.

Paragraph 5

- (1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to -
 - (a) the person by whom it is payable,
 - (b) the person to whom it is payable,
 - (c) the amount which is payable,
 - (d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.