



SOUTHERN RENT ASSESSMENT COMMITTEE

LEASEHOLD VALUATION TRIBUNAL

Commonhold and Leasehold Reform Act 2002, Schedule 11 (the '2002 Act')

Case no. CN/21UC/2009/0009

<u>Premises</u>	Flat 1, 9 Glanville Road, Eastbourne, East Sussex BN20 7EG
<u>Applicants</u>	Ms B Kelly & Mr N Connor (trustees of the freeholder and landlords under the leases)
<u>Representation</u>	Stephen Rimmer (solicitors)
<u>Respondent</u>	Mr F Taylor (leaseholder of the subject premises)
<u>Representation</u>	TWM Solicitors LLP
<u>Date of Hearing</u>	A determination was made on 23 April 2010 on consideration of the papers filed on behalf of the parties
<u>Date of Inspection</u>	None
<u>Date of Decision</u>	4 May 2010
<u>The Tribunal</u>	James Driscoll, solicitor (Lawyer Chair) and Robert Wilson, solicitor

DECISION

- 1. The Tribunal considered the application for a determination of the reasonableness of administration charges under the provisions in the 2002 Act.**
- 2. These charges are the legal costs claimed by the applicant landlords in the preparation and the service of a forfeiture notice under section 146 of the Law of Property Act 1925.**
- 3. Provision for the recovery of these costs is made in clause 2(9) of the lease.**
- 4. We determine that the recoverable costs include the legal costs occasioned by an application to this Tribunal for a determination that the respondent was in breach of the lease. That application was made under section 168 of the 2002 Act. Such an application is an essential step that is required by the 2002 Act as a precursor to serving a forfeiture notice where the leaseholder denies the alleged breach.**
- 5. We determine that in principle the legal costs occasioned by this application for a determination of an administration charge are not recoverable. However, as the parties agreed that the applicant's legal costs could include such costs we also considered their reasonableness.**
- 6. We determine that the reasonable administration charges for the legal costs of preparing and serving a forfeiture notice is the sum of £2,794. VAT at the appropriate rate is to be added to this figure.**

Introduction

1. This is an application to determine the reasonableness of administration charges. The applicants are the trustees of the freehold of the building containing the subject premises and the landlord under eight long leases of flats in the building containing the flats. The respondent is the leaseholder of Flat 1 in the building. He holds a lease made on 31 July 1984 for a term of 99 years from 25 March 1975. This was later varied by a deed made 21 March 2007 substituting a new term of 99 years from 29 September 2004 at a peppercorn rent. The terms of the substituted lease are essentially the same as the original lease.
2. In August 2009 this Tribunal determined that the respondent had broken a term of the lease by subletting the flat without obtaining the consent of the landlords as required in clause 2(12)(b) of the lease. It was common ground that the respondent had granted a six month assured shorthold tenancy of the flat on 27 February 2009 and that he had not obtained the consent of the landlords before doing so.
3. That determination was made on an application under section 168 of the 2002 Act. In that application the applicants also contended that the lease had been assigned to the respondent without the prior consent of the applicants. However, as the assignor was not a party to the application the tribunal declined to make any finding on that part of the application.
4. Both parties were legally represented at that hearing.
5. Following that decision, those advising the applicants served a forfeiture notice on the respondent under section 146 of the Law of Property Act 1925. This notice stated that the ground on which forfeiture was claimed was the unlawful subletting of the respondent's flat. The notice claimed that this breach of the lease was irremediable, but that if the respondent considered that it was remedial, that it should be remedied and that in either event the respondent should pay compensation to the applicant. This notice was given on 28 August 2009.
6. At the time of the service of the forfeiture notice, the subtenants had given up possession. The applicants state that they were unaware of this. They claim their legal costs for the preparation and service of the forfeiture notice as an administration charge and in accordance with the power to make such charges in the lease.

This application

7. As the parties could not agree on the payment of these costs as an administration charge, a further application was made to the Tribunal on 19 November 2009 seeking a determination of the charge under the provisions in Schedule 11 to the 2002 Act.

Directions were given on 27 November 2009 directing that the matter be determined on the basis of the papers and without an oral hearing.

8. Later the respondent raised the issue of whether the applicants have the right to recover these administration charges at all. Further directions were given by the tribunal on 22 December 2009 directing that a preliminary hearing be held to determine that matter. Detailed submissions were submitted by those advising the parties. These submissions addressed the issue of jurisdiction and the legal costs claimed. A skeleton argument was prepared by counsel for the applicants.
9. At the hearing held on 18 February 2010 we determined that in principle the applicant is entitled to recover the costs involved in the service of a notice under section 146 of the Law of Property Act under the terms of the lease.
10. The parties had exchanged submissions on the costs that could reasonably be recovered. They were not in a position to make representations at the hearing and later agreed to this issue being determined on the basis of their written submissions and without an oral hearing.
11. We met to consider the submissions and to make a determination on 23 April 2010.

Reasons for our decision

12. The applicant seeks payment of their legal fees in preparing and serving the forfeiture notice. The parties agree that this charge is an administration charge within the meaning of Schedule 11 to the 2002 Act, paragraph 1 of which reads as follows:

- (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.

10. They rely on clause 2(9) in the lease which is in the following terms:

‘To pay all costs charges and expenses (including Solicitors’ costs and Surveyors’ fees) incurred by the Lessors for the purpose of or incidental to the preparation and service of a Notice under sections 146 and 147 of the Law of Property Act 1925 notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court’.

11. Our task is to consider the scope of what can be reasonably charged for the work undertaken in this case in the preparation and service of a notice given under section 146 of the 1925 Act (which is often referred to as a 'forfeiture notice'). It is necessary to record the changes in the law relating to the service of forfeiture notices since 1984 when this lease was granted. The Housing Act 1996, introduced restrictions on the right to forfeit a residential lease. Under sections 81 and 82 of the 1996 Act, landlords may not serve a forfeiture notice for non-payment of a service charge unless the amount of the charge has been determined by this tribunal. Service of a forfeiture notice was permitted provided the restrictions in the 1996 Act were referred to in the notice.
12. These changes were taken a stage further by the reforms made under Part 2 of the Commonhold and Leasehold Reform Act 2002. Under section 168 of the 2002 Act forfeiture cannot be undertaken unless the landlord has first obtained a determination from this Tribunal that the leaseholder is in breach of the lease. As a result a forfeiture notice cannot be served unless the landlord has first sought and obtained such a determination. (To complete the picture, no forfeiture can be undertaken for non-payment of small amounts or amounts left unpaid for a short time, under section 169 of the 2002 Act).
13. As a result of these statutory changes, a landlord under the terms of a lease such as this, may not prepare and serve a forfeiture notice without first seeking a determination under section 168 of the 2002 Act **unless** the leaseholder admits the breach (emphasis added).
14. It follows, in our view, that where a landlord has to make an application to this Tribunal under section 168 of the 2002 Act, in principle, the landlord can claim the reasonable costs entailed in making such an application where the lease provides for the costs of preparing and serving the forfeiture notice. Clause 2(9) of the lease refers to '*all costs charges and expenses (including Solicitors' costs and Surveyors' fees) incurred by the Lessors for the purpose of or incidental to the preparation and service of a Notice under sections 146 and 147 of the Law of Property Act 1925*'. We conclude that as the solicitor's costs were incurred as a necessary step in the preparation of the forfeiture notice that they are in principle recoverable. It is also important to note here that the respondent leaseholder could have avoided these costs if he had admitted that a subtenancy had been granted without consent in breach of the lease.
15. Of course in this case there was a further application to this Tribunal as the parties could not agree on the level of the legal costs recoverable under the lease. This is the application for a determination of the reasonableness of the administration charge. Here the relevant provisions is under Schedule 11 to the 2002 Act which reads as follows:

Reasonableness of administration charges

2

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

16. The other relevant statutory requirements are that a notice of rights must be given if the charge is to be recoverable and that applications are made to this Tribunal.
17. Can the costs of applying to this Tribunal to determine the reasonableness of administration charges be recovered? We consider that in principle the answer is that they cannot. A party to proceedings in this Tribunal should understand that ordinarily no costs orders can be made and there are other restrictions on the recovery of legal costs in leasehold management.
18. The applicants should have realised, or should have been advised by their solicitors, that they cannot recover their legal costs in taking proceedings in this Tribunal. In general terms this principle is no different to an application for a determination of a service charge where no costs can be ordered and the restrictions on the recovery of costs as future service charges may be made under section 20C of the Landlord and Tenant Act 1985 should also be noted. Another example are enfranchisement claims where the leaseholder's liability for the landlord's professional costs does not include the professional costs in attending this Tribunal where the parties are unable to agree the price or other terms of the enfranchisement.
19. To summarise we conclude that a landlord who is entitled under the lease to recover the costs of preparation of a forfeiture notice is also entitled to include the costs in applying to this Tribunal under section 168 of the 2002 Act where the leaseholder does not admit the alleged breach and the determination is made in the landlord's favour.
20. However, we do not consider that, in general, where a landlord applies to this Tribunal for a determination of the reasonableness of an administration charge, that his professional costs in making that application can be recovered. It is very important the parties and those advising them bear in mind in making applications to this Tribunal that we are in general a 'no costs' Tribunal: the successful party will not recover his costs. Each party must bear their own costs. This tribunal cannot as a rule awards costs against a party. In limited cases it can require one party to pay up to £500 in costs to the other and it can also order a party to reimburse the other the fee payable in making an application.
21. It follows that in this case the applicants are entitled to include in their claim for costs made under clause 2(9) of the lease their reasonable costs in obtaining the determination under section 168 of the 2002 Act. However, as a matter of principle, the applicants are not entitled to their professional costs in seeking a determination of the reasonableness of an administration charge (the costs of the forfeiture notice in this case).
22. However, there are two considerations which justify a different approach in this case. First, and most importantly, the respondent has, through his solicitors accepted in principle that the applicants are entitled to their costs in relation to the administration charge application. Second, when the applicants first applied for this determination,

the respondents raised the issue of whether the forfeiture notice was validly given. They argued that it was not and that this invalidated the costs claim.

23. This formed the subject matter of the determination we made on 18 February 2010. Again, the respondent appears to accept in principle, the applicants are entitled to include their costs as part of the claim for costs under clause 2(9) of the lease. We note that the respondent could have avoided the additional costs occasioned by the necessity to apply for a determination under section 168 of the 2002 Act and could also have avoided much of the costs of administration charge application by then arguing that the forfeiture notice was invalid.
24. If the respondent had challenged the inclusion of the legal costs of the administration application charges, we consider for the reasons given above, that he would have had cogent reasons for doing so. But instead he has through his advisors admitted the principle of including these charges and has made a detailed response to the costs claimed. We now turn to these costs.
25. Turning to the costs claimed, the position of the parties is set out in a statement called a Bill of Costs prepared by a costs draftsman claiming the total of £7,915.47, a later Statement of Case claiming additional costs relating to the drafting of the Bill of Costs, an application fee to this Tribunal and the costs of the application making a total claim of £9,860.71; a Statement of Case of the Respondent dated 12 January 2010 and a Supplementary Statement from the applicant dated 17 February 2010. In this supplementary statement the applicant claimed a revised sum of £4,747 for their legal costs claimed as administration charge.
26. This Tribunal is very surprised at the size of the claim for costs which was originally charge at £7,915.47, then increased to £9,860.71 and then revised to £4,747. According to the respondent the appropriate figure should be £2,102 (plus £16 as a disbursement). These costs seem to us to be wholly disproportionate when one considers that the charges relate to the preparation and service of a forfeiture notice.
27. We repeat the point that the parties agree that this is an administration charge. We are to determine if charging the sum of £4,747 under clause 2(9) of the lease is reasonable under the terms of Schedule 11 to the 2002 Act
28. The respondents made several objections to the costs claimed. In the event the applicants conceded many of these points and we do not think it necessary to summarise these points and concessions. Our principal concern is that the applicants seek their recover their legal costs of preparing and attending two hearings and costs associated with this determination. We repeat the point that as the respondent did not admit the breach occasioned by the subletting, the applicants had no alternative but to apply to this Tribunal for a determination of the breach as a precursor to preparing and serving the forfeiture notice. Further once the Tribunal determined that the respondent was in breach the applicant was entitled to serve a forfeiture notice (which they did) and to seek recovery of their legal costs under clause 2(9) of the lease.
29. In this case, however, the respondent then claimed that the forfeiture notice was invalid and that in consequence no costs could be recovered. Again the only way the

applicants could proceed to recover the costs was by seeking a determination, which they did. The respondents having accepted in principle legal costs could in this particular case be recovered the Tribunal now turns to the reasonableness of the costs.

30. Having regard to the papers we have considered and our own experience we conclude that it was reasonable for the applicants to use their solicitors in relation to the application under section 168 of the 2002 Act, to prepare and serve the forfeiture notice and then to seek a determination as to whether the forfeiture notice was valid. We have concluded that it is was reasonable for the applicant's solicitor to spend three hours in the preparation of the application under section 168 and the forfeiture notice. We have also concluded that it was reasonable for the applicant's solicitor to spend three hours preparation for the second hearing having regard to legal issues that were raised. However, we do not think that it was reasonable for the applicant's solicitor to attend either hearing.
31. We have concluded that it would be reasonable and more cost-effective for counsel to have been instructed for both hearings at a fee of £750 for each hearing. We do not think that it was reasonable for the applicant's solicitor to have appeared at either hearing. Allowing a figure representing counsel fees of £1,500 we add to this six hours at the rate of £213 per hour (adopting as the parties have the hourly county court rates) which produces a figure of £2,778 as a reasonable administration charge in seeking costs under clause 2((9) of the lease. To this is to be added a disbursement of £16 which has been agreed. VAT at the applicable rate is to be added.
32. We conclude by emphasising that this is an unusual application for the reasons set out above and that ordinarily legal costs of seeking determinations in this Tribunal are not recoverable.

James Driscoll

James Driscoll (Lawyer Chair)

Dated: 4 May 2010