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

**Case Reference** : LON/00BK/LAC/2014/0002

**Property** : Flat 73, Fursecroft, George Street,  
London, W1H 5LF

**Applicant** : Mr Lawrence Hay

**Representative** : Mrs E Hay, 12 Gabeson Avenue,  
Brighton, BN1 5FG

**Respondent** : Safin (Fursecroft) Limited (1)  
The Trustees of the Portman  
Family Settled Estates (2)

**Representative** : Howard Kennedy fsi

**Type of Application** : For the determination of the  
reasonableness of and the liability  
to pay an administration charge

**Tribunal Member** : Robert Latham

**Date and venue of  
Hearing** : 18 March 2014 at 10 Alfred Place,  
London WC1E 7LR

**Date of Decision** : 18 March 2014

**Decisions of the Tribunal**

- (1) The Tribunal determines that the sums of £1,250 + VAT in respect of the licence to assign and £1,320 in respect of the freeholder's charges for the licence required under the terms of the head lease are payable.
- (2) The Tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

## **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 amount of administration charges payable by the Applicant in respect of a licence to assign. The Applicant further seeks reimbursement of the application fee of £125, which he has paid and for an order under s.20C of the Landlord and Tenant Act 1985.
2. Directions were given on 21 January 2014. Pursuant to those Directions:
  - (i) The Applicant has filed his Statement of Case (3.2.14 at p.87-91);
  - (ii) The First Respondent has filed its Statement in Response (21.2.14 at p.108-114)
  - (iii) The Applicant has filed a Supplementary Reply (27.2.14 at p.137-141).
3. On 18 February (at p.97), the First Respondent raised an issue of jurisdiction. It contends that the administration charges in dispute have been “agreed or admitted” by the Applicant and that the application is thereby precluded by Paragraph 5(4)(a) of Schedule 5 of the 2002 Act. The First Respondent was anxious for the matter to be resolved as a preliminary issue to avoid the escalation of costs. On 24 February (at p.23), the Tribunal directed the Applicant to respond to the allegation. On 25 February (at p.25), the Applicant stated that he would deal with this in his Supplementary Reply.
4. Both parties have been content for the Tribunal to deal with this as a paper determination. The relevant legal provisions are set out in the Appendix to this decision.

## **The Lease**

5. The application relates to the premises at Flat 73, Fursecroft George Street, London, W1 which the Applicant has held pursuant to an underlease dated 17 January 2001 (at p.27). There are three parties to the lease: (i) the lessor - the First Respondent; (ii) the lessee - the Applicant; and (iii) the trustee - the Second Respondent who is the freeholder.
6. The parties rely upon the following terms of the lease:
  - (i) Clause 2.10(a) whereby the lessee covenants not to assign the lease without the previous consent in writing of the lessor;

(ii) Clause 2.11 whereby the lessee covenants, upon any assignment, to cause the assignee to enter into direct covenants with the lessor and the trustee to observe and perform the covenants and conditions in the lease; and

(iii) Clause 2.18 whereby the lessee covenants to pay all reasonable costs and expenses of the lessor and freeholders (including all solicitors' costs and fees) incurred in granting any consent under the Lease.

### **The Background**

7. On 28 August 2013 the Applicant, through Lorrells LLP ("Lorrells") Solicitors who were acting for him at the time, wrote seeking the First Respondent's written consent to assign the lease. On 28 August (at p.115), Howard Kennedy fsi ("Howard Kennedy"), the First Respondent's Solicitor, replied setting out the lessor's requirements in respect of the proposed assignment. These included:

(i) an undertaking to meet their legal costs in the sum of £1,250 + VAT in respect of the licence to assign.

(ii) payment of a rent deposit and additional legal fees of £750 + VAT which would be payable were the proposed assignee not intending to reside at the premises; and

(iii) an undertaking to pay the freeholder's charges in respect of the licence required under the terms of the lessor's head lease in the sum of £1,320.

It is apparent that the proposed assignee intended to reside at the premises, so (ii) above is not relevant to this application.

8. On 12 September (at p.117), Lorrells replied. On the administration charges sought by the lessor, Lorrells wrote:

"the fees quoted are a little on the high side from our experience and we would therefore ask that you justify your fees by return".

9. On 13 September (at p.118), Howard Kennedy wrote:

"We are not sure what you mean when you ask us to 'justify' the fees quoted, which are as we have said £1,250 + VAT in respect of the licence to assign, and £750 + VAT in respect of any rent deposit deed. We also require your firm's undertaking in respect of the freeholder's charges, regardless of whether this matter proceeds to completion. Our client's costs are intended to include the work necessary to deal with the restriction registered on your client's title".

10. On 26 September (at p.119), Lorrells wrote to Howard Kennedy in these terms:

“We hereby undertake to be responsible for your fees in the sum of £1,250 + VAT in respect of the licence to Assign for the above premises, payable whether or not the matter proceeds to completion.

We also undertake to pay the Freeholders charges in relation to the Licence required under the terms of the Headlease and any covenants that are required to be entered into in the sum of £1,320. The Licence fee is payable whether or not the matter proceeds to completion”.

### **The Preliminary Issue**

11. The preliminary issue which the Tribunal is required to determine is whether the administration charges in dispute have “been agreed or admitted by the tenant” (Para 5(4)(a) of Schedule 11 of the 2002 Act). A tenant “is not to be taken to have agreed or admitted any matter by reason only of having made any payment” (Para 5(5)).
12. The First Respondent contends that, in its letter of 26 September, Lorrells gave an unconditional undertaking to pay the sum demanded. There were a number of other options open to the Applicant, namely (i) to refuse to pay the administration charge; (ii) to pay the charge under protest; (iii) to pay on a “without prejudice basis”; or (iv) to reserve his position pending a determination by the Tribunal.
13. The Applicant responds that he never agreed or admitted that the Respondents’ costs were reasonable and/or payable. He found himself without a negotiating position. He had no option but to pay the sum demanded if the assignment were to proceed. He suggests that had he made an undertaking under protest or whilst reserving his position, the lessor would not have continued with the assignment. He further states that he left the exact wording of the undertaking to his Solicitor and was unaware of his right to challenge the reasonableness of the service charge. He suggests that his Solicitor was not engaged to give legal advice with regard to this matter.
14. The Applicant relies upon two Tribunal decisions:
- (i) LON/00BF/LVA/2008/0001: The Tribunal noted (at [4]) that the Applicant’s solicitors gave the usual undertaking to pay the Respondent’s legal fees “which it is common ground does not prevent the reasonableness of those fees being challenged”. In that case, the point currently in issue was neither taken nor argued.
- (II) LON/OOAW/LVA/2012/0006: Again, the Tribunal noted (at [8]) that the licence was prepared after receiving an undertaking from the

Applicant's solicitors to be responsible for their fee. Again, the point currently in issue was neither taken nor argued.

15. The point was specifically considered by the Upper Tribunal in *Crosspite Ltd v Sachdev* [2012] UKUT 321 (LC); [2013] 1 EGLR 31. HHJ Gerald gave the following guidance (at [15] – [17]):

“15. In my judgment, the LVT had no jurisdiction to determine the issue of the Appellant's entitlement to require payment of its costs of consenting to underletting. There are two reasons. ....

16. Secondly, the Respondents had by their 9th June 2011 email made it clear that they accepted that the Appellant was entitled to require such payment but merely challenged the reasonableness of the sum demanded, so that they could not have challenged the Appellant's ability to demand payment as such had been “agreed or admitted by the tenant” within paragraph 5(4) of Schedule 11 to the 2002 Act. No particular form or formality as to how agreement or admissions are made is prescribed by the Act. Logically, they must pre-date the making of the application otherwise there would be no ousting of right to make an application under paragraph 5(1). In principle, there is no reason why such cannot be made informally.

17. Whilst not expressed as an agreement or admission, it was implicit within the phrase “not averse to paying an administration charge” contained in the 9th June 2011 email that the Respondents admitted that the Appellant was able to demand payment for its costs of consenting to underletting. They of course have subsequently reiterated that position in their 17th January 2012 Statement of Case where they again make it clear that the only matter in issue is the reasonableness of the costs not the Appellant's entitlement to require payment. The agreement or acceptance implicit within the email sufficed for the purposes of paragraph 5(4) of Schedule 11 to the 2002 Act.

16. The Tribunal must have regard to the correspondence and ask itself whether the objective observer would conclude that the lessee had agreed or admitted that the two administration charges in dispute were payable. The statute expressly provides that mere payment of the administration charges would not constitute such an agreement or admission. The Tribunal must also have regard to the legislative purpose, namely to afford an effective remedy to a lessee who wishes to challenge the payability and reasonableness of an administration charge.
17. The Applicant instructed solicitors to act on his behalf. They acted within their ostensible authority to negotiate the required licence to assign on his behalf. They queried the reasonableness of the sums sought. The lessor responded to these queries. They then gave an express undertaking to pay the two sums in dispute. The only possible conclusion is that the Solicitors were agreeing both to the payability and the reasonableness of the two administration charges which were demanded. The Tribunal therefore concludes that it has no jurisdiction to deal with this application.

18. In the light of this decision on the preliminary point, it is not necessary to consider the reasonableness of the sums demanded. Further, in the light of the ruling, it is not it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act or for the Respondent to be ordered to reimburse the Applicant the tribunal fees that he has paid.

**Robert Latham,**

**Tribunal Judge**

18 March 2014

## **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—
  - (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.
- (2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.
- (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.
- (4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

#### **Schedule 11, paragraph 2**

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

#### **Schedule 11, 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) Sub-paragraph (1) applies whether or not any payment has been made.

- (3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
- (4) No application under sub-paragraph (1) may be made in respect of a matter which—
  - (a) has been agreed or admitted by the tenant,
  - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  - (c) has been the subject of determination by a court, or
  - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.
- (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
  - (a) in a particular manner, or
  - (b) on particular evidence,
 of any question which may be the subject matter of an application under sub-paragraph (1).

## **Landlord and Tenant Act 1985**

### **Section 20C**

- (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 a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

.....

- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

## **The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**

### **Regulation 13**

- (2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.