12427

First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/22UD/LSC/2017/0071**
Property	:	**3 Beech Spinney, Lorne Road, Warley Hill, Brentwood, CM14 5HH**
Applicant	:	**Retirement Lease Housing Ass.**
Respondent	:	**Phyllis Habbershaw**
Date of Transfer from the County Court at Romford	:	**30th June 2017**
Type of Application	:	**to determine reasonableness and payability of service charges and administration charges**
The Tribunal	:	**Bruce Edgington (Lawyer Chair) David Brown FRICS**

DECISION

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1. The Tribunal determines that in respect of the various claims made by the Applicant in the county court particulars of claim, those matters within the jurisdiction of this Tribunal i.e. service charges and administration charges, are not payable under the terms of the lease.

2. The claim is transferred back to the county court sitting at Romford under claim no. C08YP716 for determination of any other issues. The parties should note that it will be up to them to make any application to the court in relation to those matters.

Reasons

Introduction

3. The Respondent is the long leaseholder of the property and the Applicant is pleaded as being "*responsible for the management of common areas under the terms of the lease*" without actually claiming to be the landlord. The flat is part of a development of 29 flats which can only be occupied by people aged 60 or over. There is a guest's bedroom for the use of the long leaseholders and common parts including a common room.

4. Court proceedings were issued by the Applicant on the 2nd November 2016 for service charges of £8,139.59 plus court fee of £455 and legal costs of £100 plus statutory interest. The 'Particulars of Claim' were endorsed on the reverse side of the claim form which in fact provided no particulars or details of the claim and quantified it as £10,857.93 plus interest, £734.40 in legal costs and disbursements plus further costs. No explanation has been given for the discrepancy in the figures.

5. The defence filed is undated and denies liability. Legal technicalities are pleaded concerning the identity of the Defendant and service of the proceedings. These are matters within the court's jurisdiction and have not been considered by this Tribunal. If they are being seriously argued by the Defendant, then, with respect, they should have been determined by the court before the case was transferred to this Tribunal.

6. The remainder of the defence says that there are no unpaid service charges. As to administration charges, it is acknowledged by or on behalf of the Defendant that various demands have been made for legal fees but it is pleaded that these are not payable under the terms of the lease or, alternatively, that they are "entirely unreasonable" and "grossly disproportionate".

7. A reply has been filed which accepts that the claim is just for "unpaid legal fees" and in that respect, it is alleged, in summary:-

   (a) That because of the Defendant's behaviour in the common parts, nuisance and disruption were caused and the Applicant was "forced to take action and seek legal advice" and
   (b) That such actions were breaches of the terms of the lease and
   (c) The seriousness of the behaviour meant that the Applicant "*was bound to take action for breach of covenant.....Under Clause 23 of Schedule 6 of the Lease the Claimant is contractually entitled to recover such fees from the Defendant since all of the action taken was of an* (sic) *incidental to forfeiture of the Defendant's lease*".

8. By order of District Judge Kemp dated 30th June 2017 it is said "Upon hearing the Solicitor for the Defendant and hearing Counsel for the Claimant IT IS ORDERED THAT (1) Transfer to the First Tier Tribunal and (2) costs reserved".

9. The Tribunal issued a directions order on the 28th July 2017 directing the parties to exchange written representations, particularly with regard to the quantum of costs claim and stating that the Tribunal would be content for the matter to be determined on the basis of the papers filed and written representations. It was made clear that if either party wanted an oral hearing then one would be arranged. No such request was received.

10. It should be made clear that one of the directions ordered the Applicant to "*set out why the costs were incurred, when and in what way the decision was made to forfeit the lease and why, in paragraph 14(viii) of the Reply, it is suggested that the costs do not have to be reasonable...*".

11. A bundle has been lodged for the determination which contains the pleadings, the lease and the written representations of the parties. With regard to forfeiture, the Applicant simply says "*The Applicant had, throughout the action, a fixed intention that if the Respondent failed to remedy the breaches of Lease it would forfeit the Respondent's Lease as being the only possible way of protecting the other residents from the ongoing nuisance. The Applicant's witnesses can give evidence to this effect*". No further explanation was given and no witness statements were filed.

The Lease

12. The bundle produced for the hearing included what appeared to be a copy of the lease which is dated the 18th August 1989. Cairnfinch Ltd. is said to be the landlord and Phyllis Margaret Habbershaw is the leaseholder. The term on page 13 in the bundle is 125 years but the date for commencement of the term is left blank. The Tribunal has not seen the entries at the Land Registry but if there is any doubt about when the lease commenced, this needs to be rectified immediately.

13. As the Applicant has rightly pleaded, the only reference to the landlord being able to recover legal charges is in clause 23 of the Sixth Schedule which says the "*The Lessee shall pay all costs charges and expenses (including Solicitors costs and Surveyor's fees) incurred by the Lessor for the purpose of or incidental to the preparation and Service of a Notice under Section 146 of the Law of Property Act 1925 notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court*".

The Law

14. Section 18 of the **Landlord and Tenant Act 1985** defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'. In this case, the Applicant acknowledges that none of the claim is for such services.

15. Paragraph 1 of Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") ("the Schedule") defines an administration charge as being:-

> *"an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable...directly or indirectly in respect of a failure by the tenant to make a payment by the due date to the landlord....or in connection with a breach (or alleged breach) of a covenant or condition in his lease."*

16. Paragraph 2 of the Schedule, which applies to amounts payable after 30th September 2003, then says:-

> *"a variable administration charge is payable only to the extent that the amount of the charge is reasonable"*

17. It should be noted that administration charges have to be "*payable*" under the terms of the lease. In other words, costs incurred because there has

been an alleged breach of covenant are only payable if the lease says that they are payable which is not the case in this lease.

18. In the case of **Barrett v Robinson** [2014] UKUT 0322 (LC), the Upper Tribunal considered the question of when a section 146 clause, such as in this case, became operative. At paragraph 52, the Tribunal said:-

> *"Costs will only be incurred in contemplation of proceedings, or the service of a notice under section 146 if, at the time the expenditure is incurred, the landlord has such proceedings or notice in mind as part of the reason for the expenditure. A landlord which does not in fact contemplate the service of a statutory notice when expenditure is incurred, will not be able to rely on a clause such as 4(14) as providing a contractual right to recover its costs".*

19. This case was referred to with approval in the case of **Willens v Influential Consultants Ltd.** [2015] UKUT 0362 (LC).

The Inspection

20. In view of the issues involved, the Tribunal determined that it would not inspect the property. This was notified to the parties who were told that if either wanted an inspection, they should apply and such application would be considered on its merits Neither requested such an inspection.

Discussion

21. The first issue to be considered is whether the Applicant is in fact the landlord as it is only the landlord who can rely on the costs provisions in the lease. No-one other than the landlord can forfeit a lease i.e. serve an effective section 146 notice. It is certainly not pleaded by the Applicant that it is the landlord.

22. The problem with the defence is that it is not signed by the Respondent and it is not even dated. It is signed by someone called James Christopher Humphreys who does not give any indication as to his relationship with the Respondent. He does state that the Respondent believes that the facts in the defence are true.

23. What can be said, however, is that the defence is written in very technical legal language and the Tribunal can only infer that it was drafted with legal advice or, indeed, was drafted by a lawyer. It covers some 7 pages and 32 paragraphs of single spaced small print. At no point does the Respondent say that the Applicant is not the landlord. In these circumstances, the Tribunal infers that the Applicant is the landlord.

24. The next question to consider is whether the costs have in fact been incurred *"for the purpose of or incidental to the preparation and Service of a Notice under Section 146 of the Law of Property Act 1925"*. It was for precisely this purpose that the Applicant was ordered to *"set out why the costs were incurred, when and in what way the decision was made to forfeit the lease...."*.

25. The fact of the matter is that this question has not been answered save for a very general comment that the Applicant had forfeiture in mind throughout but without any evidence to support such a comment. Forfeiting a long lease is a very serious step and no decision would be made to take such action without a full consideration of the issues and the possible consequences. At the time of the alleged nuisance being perpetrated by the Respondent, she was living in what was and is an old people's community.

26. If the Respondent was guilty of causing a nuisance, the Tribunal can understand that this would be a very difficult situation to manage. Whether proceedings were issued to obtain an injunction is not known. If they were and it was found that there had been a nuisance, no doubt a costs order would have been obtained. However, to just say that forfeiture was always in the mind of the Applicant is not sufficient without clear evidence that the decision had been taken to serve a section 146 notice. That evidence, if it exists, has not been produced despite the Applicant having been ordered to do so.

Conclusion

27. The Tribunal, having taken all the evidence and submissions into account, concludes that there is no evidence that at the time when the legal costs were incurred, a decision has been taken by the Applicant to serve a section 146 notice. It therefore cannot rely on paragraph 23 of the Sixth Schedule to the lease which is the only clause permitting recovery of legal costs under the contract between the parties.

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Bruce Edgington
Regional Judge
10th November 2017

ANNEX - RIGHTS OF APPEAL

i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. 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.

iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

iv. 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.