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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/00HG/LAC/2015/0011**
Property	:	**Flat 5, 37 Efford Road, Higher Compton, Plymouth, Devon PL3 6NE**
Applicant	:	**The Old Dairy (Management Company) Ltd**
Representative	:	**Nash & Co, solicitors**
Respondent	:	**April Ward**
Representative	:	
Type of Application	:	**Liability to pay administration charges**
Tribunal Members	:	**Judge MA Loveday**
Date and venue of Hearing	:	**Determination without a hearing**
Date of Decision	:	**24 March 2016**

DECISION

Introduction

1. This application seeks a determination of liability to pay an administration charge of £2,586.40 under Sch.11 to the Commonhold and Leasehold Reform Act 2002. The charge relates to legal and other costs incurred in connection with an alleged breach of covenant by a lessee not to keep a dog at Flat 5, The Old Dairy, 37 Efford Road, Higher Compton, Plymouth, Devon PL3 6NE.

2. The Applicant (a company owned by the lessees in the building) is the registered proprietor of the freehold. The Respondent is the lessee of the Flat.

3. On 10 December 2015, directions were given that the application should be determined on the basis of written representations without an oral hearing.

Facts

4. I am grateful to the Applicant's solicitors and the Respondent (acting in person) for providing succinct and helpful Statements of Case and comprehensive documents in support. The facts appear in the Statements of Case and the documents provided to the Tribunal, and do not seem to be in dispute.

5. The premises comprise a flat on the second floor of a modern residential development of 13 flats c.1987.

6. The Lease is dated 8 May 1987 and contains the following material provisions:
    a. By clause 3, the lessee covenanted to perform the provisions in the Fourth Schedule and to observe the regulations in the Sixth Schedule.
    b. By para 27 of the Sixth Schedule, the regulations provided that the lessee was:
        > "27. Not to keep any live fowls in the demised premises nor any bird dog or other animal in the demised premises without the previous consent in writing of the Landlord such consent to be revocable by notice in writing at any time on complaint of any nuisance or annoyance being caused to any owner tenant or occupier of any of the other residential flats."
    c. By para 3 of the Fourth Schedule, the lessee agreed:
        > "3. To pay and reimburse in respect of the Landlord all fees costs charges and expenses (including Counsel's and Solicitors and any other legal costs and all fees payable to

a surveyor) which may be incurred by the Landlord in connection with or for the purposes of or incidental to:

(1) the recovery of arrears of the rent and the contributions to the Maintenance Fund and Maintenance Reserve Fund provided for herein

(2) its [sic] determining whether any covenant herein has been broken or for enforcing any such covenant (which matters shall without prejudice to the generality of the foregoing extend to the costs of and incidental to any inspection of the demised premises and the preparation compilation and drawing up of Schedules of Dilapidation and of the preparation and service of any notice or proceedings including notices under Sections 146 and 147 of the Law of Property Act 1925 or any re-enactment or modification thereof and notwithstanding that any forfeiture is avoided otherwise than by relief granted by the Court) and whether or not the same shall be proceeded by the Landlord"

7. The issue of pets apparently first emerged at the Applicant's AGM on 27 May 2014 which was attended by a number of the lessees. The minutes of the meeting show the Respondent "informed the meeting of her intention to keep a pet in Flat 5", but that another lessee objected. There parties then exchanged correspondence about what happened at the meeting. Eventually, having sought advice from LEASE, the Respondent wrote on 16 January 2015 formally seeking permission for "my own dog". The Applicant's secretary, Mr Jon Gynne, refused consent on 25 January 2015. Mr Gynne's letter stated that he had spoken to the majority of lessees and given them a brief note of the formal request. Nine of the tenants had said "No" to the proposal and two had abstained. Mr Gynne therefore explained the reason for refusing consent was because there was "not a majority support in the building for the keeping of a dog in the demised premises".

8. Following a further exchange of correspondence, the Applicant wrote on 26 February and 3 March 2015 to say that the Respondent appeared to be keeping a dog in the flat despite the refusal of consent. On 4 March 2015, the Respondent acknowledged she had a dog called "Mabel", but that she had been acting as a responsible dog owner. A Special General Meeting took place on 6 March 2015, when a decision was made to employ solicitors to deal with the issue of the dog. In anticipation of this move, the Respondent herself retained Curtis Whiteford Crocker solicitors. They wrote to the Applicant on 8 April 2015 saying the Respondent would strongly oppose any proceedings.

9. On 15 April 2015 the Applicant's solicitors Nash & Co responded by threatening to serve a s.146 notice unless the Respondent re-homed her dog within 14 days. It appears the Respondent "temporarily rehomed her puppy" within this timeframe: see letter from Curtis Whiteford Crocker dated 20 May 2015. However, the correspondence continued about the principle of the alleged breach of covenant and costs - initially between solicitors (until 12 June 2015) and latterly between the Applicant's solicitors and the Respondent.

10. The administration charges of £1,838.40 inclusive of VAT were demanded by the Applicant's solicitors Nash & Co on 3 November 2015. The solicitors quoted the above provisions of the Lease and attached a signed Statement of Costs as follows:
    a. Attendance by two fee earners at Nash & Co (£840 + VAT).
    b. Work done on documents by the solicitors (£692 + VAT). The demand exhibited a schedule of Work done on Documents to support this claim.
    c. "Expenses" by the "Self Employed Company Secretary" (£340).

    The demand was accompanied by a Summary of Tenant's Rights and Obligations in relation to Administration Charges in prescribed form.

11. The Application is dated 1 December 2015.

The Applicant's case

12. The Applicant's case appears in its Statement of Case dated 1 December 2016 and in its Response dated 10 February 2016. The Applicant contends there was a breach of para 27 of the Sixth Schedule to the Lease because the Respondent kept a "dog ... in the demised premises without the previous consent in writing of the Landlord". Under para 3(2) of the Fourth Schedule, the Applicant is entitled to "determin[e] whether any covenant ... has been broken" and to "enforc[e] any such covenant". Under the same provision, the Respondent is obliged to "reimburse ... all fees costs charges and expenses (including ... Solicitors and any other legal costs ...) which may be incurred ... in connection with or for the purposes of or incidental" to the determination whether or not any enforcement action was taken. The administration charges were for such costs.

13. Moreover, the "level" of those charges was reasonable.

The Respondent's case

14. The Respondent's case appears in her undated Statement of Case. She raises a number of arguments, each of which is amplified to some extent in an "Attachment Summary". She contends that:
    a. The dog "proved not to be a nuisance". This point covers a number of arguments raised in correspondence with the Applicant and its solicitors[1]. In essence, in correspondence it was argued that (i) Para 27 of the Sixth Schedule contained an implied proviso that consent to the keeping of pets would not unreasonably be withheld (ii) It was unreasonable to withhold consent because the dog was not a nuisance. In particular, the Respondent relied on statements by the occupier of the flat below that she was not even aware there had been a puppy in Flat 3 (iii) There was inconsistency between the Applicant's attitude to pets, because a cat had been kept at Flat 9 for at least 8 years, either with the permission of the Applicant or in breach of the terms of that lease. This had "set a precedent" by which the reasonableness of the application for consent would be set.
    b. There was no breach of the terms of the Lease.
    c. Two lessees had been in breach of a covenant at para 1 of the Sixth Schedule for personal occupation by "the Tenant and his family only". They had been subletting their flats in breach of covenant.
    d. The Applicant had the option of applying to the Tribunal for a determination of a breach of covenant under s.168 of the 2002 Act. Instead, it chose the route of threatening forfeiture.
    e. Only 5 out of 13 shareholder lessees voted at the SGM on 6 March 2015 to take action against the Respondent. The decision to employ solicitors had not been made by a majority of the lessees.

    The Respondent therefore argued that "matters are unresolved", and that the correct interpretation of the lease was yet to be determined by the Tribunal.

The Issues

15. Lease covenants which provide for the lessee to pay a lessor's legal costs are commonly encountered. When a Sch.11 application is made in relation to such covenants, a Tribunal must typically consider one of more of the following:
    a. Whether the lessor may recover the charge under the terms of the lease.

[1] The Tribunal relies in particular on the contents of the solicitors' letter dated 8 April 2015 and the email from LEASE to the Respondent dated 4 June 2014 relied on by the Respondent.

b. Whether a variable administration charge is reasonable under para 2 of Sch.11 to the 2002 Act.
c. Whether there is any other statutory bar to recovery - such as the requirement in Sch.11 para 4 for a demand for payment to be in proper form.

In this matter, there is plainly a dispute about contractual liability. As to reasonableness, the Tribunal is satisfied that the Respondent's Statement of Case does raise issues of reasonableness. The third question has not been specifically raised in this application, and in any event the demand for payment dated 3 November 2015 appears to have been carefully drafted.

Contractual Liability

16. The interpretation of service charge and administration charge provisions involves no special rules of construction. The familiar principles summarised by Lord Hoffmann in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, and those set out by Lord Neuberger in the most recent decision of the Supreme Court in *Arnold v Britton* [2015] UKSC 362; [2015] 2 W.L.R. 1593) therefore apply. Provisions which enable a lessor to seek payment of costs have been particularly topical since the cases of *Freeholders of 69 Marina, St Leonards-on-Sea v Oram* [2012] L&TR 4, CA and *Barrett v Robinson* [2014] UKUT 0322 (LC). However, the interpretation of the terms of the lease will inevitably turn on the particular terms of the lease itself.

17. In this particular case, the Tribunal considers there are two separate sub-issues raised by the question of contractual liability. First, what does the lease mean? Secondly, which (if any) of the legal costs claimed fall within the lessee's contractual obligation to pay?

18. The meaning of the covenants. As far as the first sub-issue is concerned, the starting point is para 3(2) of the Fourth Schedule. Omitting the words in parenthesis, the Respondent's obligation is to indemnify the Applicant against certain costs incurred in "(2) its [sic] determining whether any covenant herein has been broken or for enforcing any such covenant ... and whether or not the same shall be proceeded with by the Landlord". The Tribunal considers the plainly meaning of these words is that the Applicant is entitled to recover costs even where no breach of covenant has taken place. It may recover the costs of simply investigating and reaching a conclusion as to whether any breach has taken place ("determining whether any covenant ... has been broken"), as well as taking action against the lessee for breach ("enforcing any such covenant"). Both these elements are always of course subject to the lessee's right to contend these charges are unreasonable under para 2 of Sch.11 (see below).

19. In the light of this interpretation of clause 3(2), it is arguably immaterial for the Tribunal to have to consider whether there was in fact a breach of covenant in this matter. However, since the Tribunal has been asked to deal with that issue, and since it is also relevant to the question of reasonableness, the Tribunal will also deal with whether the Respondent was in breach of para 27 of the Fourth Schedule to the Lease.

20. Para 27 of the Sixth Schedule includes two elements. The first is that the lessee must "Not to keep any live fowls in the demised premises nor any bird dog or other animal in the demised premises without the previous consent in writing of the Landlord ..." The second element deals with revocation of consent, which we need concern ourselves with here.

21. It is suggested in the LEASE email relied upon by the Respondent that para 27 is subject to a proviso that the Applicant may only refuse consent to a pet on reasonable grounds. The Tribunal does not agree. Certain qualified covenants which require a lessor's consent to an act of the lessee will be subject to such a proviso. For example, certain alienation covenants are subject to section 19(1) of the Landlord and Tenant Act 1927. However, there is no general rule that such an implication should be made where other qualified covenants are concerned: see for example, *Guardian Assurance Co v Gants Hill Holdings* [1983] 2 EGLR 36. It follows from this that the Tribunal considers the Applicant's reasons for refusing consent are immaterial to the issue about whether the Respondent was in breach of para 27. The Respondent's allegations that the withholding of consent was inconsistent, unreasonable etc. are therefore irrelevant.

22. On this basis, the Tribunal finds there was a breach of para 27 of the Sixth Schedule to the Lease. It is not disputed the Applicant kept a puppy for a period up until around 29 April 2015. It is also not disputed that this was without the "previous consent in writing" of the Applicant. Indeed, Mr Gynne expressly refused consent on 25 January 2015.

23. The Respondent's other arguments at para 14 above can be dealt with briefly:
    a. There is evidence that at least one lessee considered Mabel was not in fact a nuisance. The Tribunal has already indicated that para 27 does not require the lessor to act reasonably when withholding consent for a pet. However, even if the Applicant was required to act reasonably, the Tribunal does not consider it acted unreasonably in refusing consent for a puppy. A reasonable lessor would have taken into account that an overwhelming majority of the other lessees objected to a dog. Moreover, such a lessor would have been aware that even the

best behaved puppy might change or grow into a much larger animal which was more difficult to control. A blanket ban on dogs would therefore have been sustainable as a reasonable policy in the interests of good estate management.

b. There is evidence that a cat was kept by the lessee of Flat 9 for some time. The Tribunal has already indicated that para 27 does not require the lessor to act reasonably when withholding consent for a pet. However, even if the Applicant is required to act reasonably when considering consent, the Tribunal does not consider it was outside the range of reasonable responses for the Applicant to treat cats and dogs differently. The animals have very different actual and potential impact on premises and grounds in terms of noise, damage and soiling. In any event there is no evidence the Applicant had expressly consented to cat in Flat 9.

c. The Respondent contends that other lessees were in breach of para 1 of the Sixth Schedule by subletting their flats. The Tribunal agrees with the Applicant on this point. Any breach of covenant by other lessees does not discharge the Respondent from her obligation to comply with her own obligations – particularly where the covenants concerned are completely different. These matters are irrelevant to the question of breach of para 27.

d. Assuming it is correct that only 5 out of 13 shareholder lessees voted to take action against the Respondent at the SGM on 6 March 2015, this again does not discharge the lessee from her obligations under the Lease. The Applicant's decision to enforce para 27 appears to have been regularly made. But any argument to the contrary is in any event a matter of company law outside the Tribunal's jurisdiction.

24. The Tribunal therefore finds that the Lease requires the Respondent to pay to the Applicant all fees costs charges and expenses including solicitors and any other legal costs incurred by the Landlord in connection with or for the purposes of or incidental to (i) determining whether para 27 of the Sixth Schedule has been broken or (ii) enforcing the covenants in the Lease.

25. Do the charges fall within the covenants? The Tribunal has considered the Applicant's Statement of Costs and the supporting documentation. It is clear the work done by the solicitors before the puppy was removed on or about 29 April 2015 related solely to the question of the alleged breach of para 27 of the Sixth Schedule to the Lease. Significant further costs were also incurred by the Applicant's solicitors after the Respondent rehomed the dog which related to (i) considering and responding to a letter from the Respondent's solicitors dated 12 June 2015 and (ii) preparing the costs schedule which accompanied the

demand for payment on 3 November 2015. The Tribunal is satisfied that (i) the former dealt substantially with determining breaches of para 27 of the Sixth Schedule and/or enforcing that provision and (ii) the latter dealt with enforcing para 3 of the Fourth Schedule. It follows that the attendance by the solicitors (£1,180 + VAT) and work done on documents by the solicitors (£692 + VAT) fall within para 3(2) of the Fourth Schedule to the Lease. These figures amount to £1,872 + VAT (or £2,246.40 inclusive of VAT).

26. The only remaining item is the claim for £340 for the self-employed company secretary. There is a supporting invoice from Mr Jon Gynne dated 23 June 2015 for this work which covers work undertaken between 2 March 2015 and 16 May 2015. The invoice shows the work related to correspondence about breaches of covenant and assistance given to the solicitors. Although not work undertaken by the solicitors themselves, the Tribunal considers that the invoice properly falls within the words "fees costs charges and expenses" and that it is recoverable under para 3(2) of the Fourth Schedule to the Lease.

27. It follows that the Tribunal finds the sum of £2,586.40 is recoverable under the Lease.

Reasonableness

28. Paragraph 2 of Schedule 11 to the 2002 Act provides that "A variable administration charge is payable only to the extent that the amount of the charge is reasonable".

29. No argument has been raised that the quantum of the charge is unreasonable. The Tribunal notes the Statement of Costs shows the main work carried out for the Applicant was undertaken by an assistant solicitor at Nash & Co's Plymouth office with over 8 years' post qualification experience. The charged rate of £200 per hour for work is consistent with the Civil Justice Council 2014 Guideline Hourly Rate of £201 for a "National 2" band solicitor of this seniority. Mr Gynne's fee is £20 per hour (or part thereof), which effectively equates to a fairly modest £20 for each letter, document etc. The Tribunal is therefore satisfied the quantum of the charge is reasonable.

30. The Tribunal further considers it was in principle reasonable to incur significant legal costs to ascertain whether there was a breach of covenant and to enforce the regulations in the Sixth Schedule. The issue of the dog was raised with the Applicant informally before any legal costs were incurred. A formal application for consent was made, and consent was formally refused. The Respondent ignored the refusal and kept a puppy in the flat despite two letters from the Applicant. On 8 April 2015, solicitors wrote on behalf of the Respondent stating she

would contest the refusal of consent. In such circumstances, a reasonable lessor would have understandably wished to retain solicitors to deal with the issue of the dog. Even after the puppy was rehomed at the end of April 2015, the Respondent continued in correspondence to argue the issue of breach of para 27 of the Sixth Schedule together with other related issues. Again, it was therefore reasonable in principle for the Applicant to incur legal costs to deal with those matters.

31. Similarly, the Tribunal finds it was reasonable to incur the costs of the Company Secretary, Mr Gynne. It appears from his invoice that he is self-employed and charges a fixed fee for his ordinary work as the Applicant's company secretary (the Respondent states this fee is £1,300pa – see Attachment Summary para 29). However, the Tribunal considers it was not unreasonable to make an additional payment for handling a breach of covenant issue involving solicitors.

32. Finally, a number of the arguments raised by the Respondent appear to be directed at the question whether it was reasonable in principle to incur the solicitors' legal costs. The Tribunal deals with these as follows:

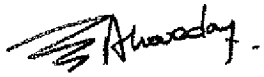
    a. Even if the Respondent is correct that Mabel was not a nuisance during the relevant time the puppy lived at Flat 5, it was relevant that an overwhelming majority of the other lessees objected to the keeping of a dog there. Moreover, for the reasons given above, a refusal of consent for Mabel or any other dog was reasonable in the interests of good estate management.
    b. It was not inconsistent to incur legal costs to pursue the breach of para 27 in relation to the dog at Flat 5, but not to pursue breaches of the similar requirement relating to the cat at Flat 9. A reasonable lessor is entitled to pursue different breaches in different ways. In any event, the circumstances of Flat 9 were different, since it involved a cat which had already been living in the flat for very many years.
    c. The issue of subletting by other lessees is irrelevant to the question of breaches of para 27 of the Sixth Schedule to the Respondent's lease.
    d. It is of course true that the Applicant had the option of applying to the Tribunal for a determination of a breach of covenant under s.168 of the 2002 Act. However, the Tribunal does not consider this assists the Respondent. The legal costs were incurred by the Applicant at a preliminary stage and resulted in the dog being rehomed within weeks. There is no evidence that an early s.168 application would have reduced the legal costs incurred – indeed, it is quite likely those costs would have been much higher.
    e. Assuming it is correct that only 5 out of 13 shareholder lessees voted to take action against the Respondent at the SGM on 6

March 2015, this again does not assist the Respondent. It is not disputed Mr Gynne's consultation established clear and overwhelming opposition to the keeping of a dog in Flat 5. In any event, for the reasons already given the question of formal authority is in any event a matter of company law outside the Tribunal's jurisdiction.

Conclusions

33. For the reason given above, the Tribunal concludes that:
    a. The charge of £2,586.40 is recoverable under the terms of the Lease.
    b. The charge is reasonable.

34. In the premises, the Tribunal determines that the Respondent is liable to pay an administration charge of £2,586.40 to the Applicant.



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Judge MA Loveday
24 March 2016

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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.