FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AP/LAC/2019/0020**
Property	**:**	**24 Twyford Court, Fortis Green, Muswell Hill, London N10 3ES**
Applicant	**:**	**Rookfield Garden Village Limited**
Representative	**:**	**Nicholas Warren**
Respondent	**:**	**Nicole Hatch**
Representative	**:**	**In person**
Type of application	**:**	**For the determination of the reasonableness of and the liability to pay an administration charge**
Tribunal members	**:**	**Judge N Hawkes** **Miss M Krisko FRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of paper determination	**:**	**13 November 2019**

DECISION

Decision of the Tribunal

The Tribunal determines that the administration charges claimed by the Applicant in this application are not payable by the Respondent.

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 any administration charges payable by the Respondent lessee pursuant to clause 3(f) of the Respondent's lease.

2. The Applicant's application is dated 10 September 2019 and Directions were issued by the Tribunal on 20 September 2019, leading up to a paper determination which took place on 12 November 2019.

The issue

3. The sole issue to be determined is whether administration charges claimed by the Applicant in the sum of £198 are payable pursuant to clause 3(f) of the Respondent's lease, by which the lessee covenants:

   "To pay all costs charges and expenses (including Solicitors' costs and Surveyors' fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of a notice under Sections 146 and/or 147 of the Law of Property Act 1925 notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court."

4. The Respondent contends that the sums claimed are not payable pursuant to clause 3(f) of the lease, alternatively that the administration charges were not reasonably incurred and/or are unreasonable in amount.

The Tribunal's determination

5. The first issue which falls to be considered is whether the costs claimed were for the purpose of or incidental to the preparation and service of a notice under sections 146 and/or 147 of the Law of Property Act 1925 ("the 1925 Act").

6. The Applicant relies upon *69 Marina, St Leonards-On-Sea Freeholders of v Oram & Anor [2011] EWCA Civ 1258* and the Respondent relies upon *Agricullo Limited v Yorkshire Housing Limited (formerly Yorkshire Community Housing Limited) [2010] EWCA Civ 229* and *Riverside Property Investments Ltd v Blackhawk Automotive [2004] EWHC 3052 (TCC).* The Tribunal considered these authorities prior to reaching its determination.

7. The Tribunal also notes that, in *Barrett v Robinson [2014] UKUT 0322(LC)*, the Deputy President considered a clause by which the lessee covenanted:

> *"To pay all reasonable costs charges and expenses (including solicitors' costs and surveyors' fees) incurred by the Lessor in or in contemplation of any proceedings or the preparation of any notice under section 146 of the Law of Property Act 1925 notwithstanding forfeiture is avoided otherwise than by relief granted by the Court."*

8. It was held that for costs to be recovered under this clause the landlord must show that they were incurred in or in contemplation of proceedings or the preparation of a notice under section 146 of the 1925 Act.

9. At [51] and [53] of the judgment, the Deputy President stated (emphasis supplied):

> "51… Sometimes it will be obvious that such expense has been incurred, as when proceedings claiming the forfeiture of a lease are commenced, or a notice under section 146 is served. In other circumstances it will be less obvious. The statutory protection afforded by section 81 of the 1996 Act requires that an application be made to the First-tier Tribunal for a determination of the amount of arrears of a service charge or administration charges which are payable before a section 146 notice may be served, but proceedings before the First-tier Tribunal for the determination of the amount of a service or administration charge need not be a prelude to forfeiture proceedings at all. The First-tier Tribunal's jurisdiction under section 27A of the 1985 Act covers the same territory, and **proceedings are often commenced in the County Court for the recovery of service charges without a claim for forfeiture being included. A landlord may or may not commence proceedings before the First-tier Tribunal with a view to forfeiture; a landlord may simply wish to receive payment of the sum due, without any desire to terminate the tenant's lease, or may not have thought far enough ahead to have reached the stage of considering what steps to take if the tenant fails to pay after a tribunal determination has been obtained.**
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> 52. 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 clause 4(14) as providing a contractual right to recover its costs."

10. Further, at [57] the Deputy President stated:

"It is always necessary to consider the terms of the particular indemnity covenant and whether any relevant contemplation or anticipation **existed in fact** in the circumstances of an individual case."

11. Accordingly, whether or not the costs claimed were incurred "for the purpose of or incidental to the preparation and service of a notice under sections 146 and/or 147 of the Law of Property Act 1925 (the terms of the particular indemnity covenant in the present case) is a question of fact to be determined by this Tribunal on the basis of the evidence before it.

12. In its statement of case, the Applicant states that, on 30 April 2018 and 26 April 2019, Leasehold Debt Recovery Limited sent letters of claim to the Respondent in accordance with the Pre-Action Protocol for Debt Claims, pursuant to instructions received from the Applicant.

13. The letters of claim were sent in respect of service charges claimed by the Applicant from the Respondent in the sum of £739.50 and £6,720 respectively. Leasehold Debt Recovery Limited charged £96 for each of the letters of claim plus a disbursement of £3 to obtain an official copy of the register of title for the property in order to comply with paragraph 3.1(a)(iv) of the Pre-Action Protocol for Debt Claims. The Applicant seeks to recover these sums from the Respondent pursuant to clause 3(f) of the lease.

14. It is open to a landlord to make an application to the First-tier Tribunal under section 27A of the Landlord and Tenants Act 1985 for a determination of a tenant's liability to pay service charges before exercising a right of forfeiture without the need to comply with the Pre-Action Protocol for Debt Claims.

15. The Applicant accepts that "the immediate purpose" of the letters of claim was to ensure that the Applicant had complied with the Pre-Action Protocol for Debt Claims. However, the Applicant goes on to state that "it should … be construed that the ultimate purpose of the Letters of Claim was for the preparation and service upon the Respondent of a section 146 notice."

16. This is on the grounds that the letters of claim would have enabled the Applicant to have commenced Court proceedings for the final determination by a Court of the Respondent's liability to pay the service charges and the Court's determination would have enabled the Applicant to prepare and serve a section 146 notice.

17. The Applicant submits that it is evident that the purpose of the letters of claim sent pursuant to the Pre-Action Protocol for Debt Claims was to enable the Applicant to prepare and serve a section 146 notice upon the Respondent because they include the following statement:

"If you fail to make payment immediately as required then further costs and interest may be added to your debt, whilst a continued failure to pay may result in a County Court Judgment being obtained against you and the loss of your interest in the property."

18. However, the letters of claim are in almost identical terms save for the sums of money sought and they have all the hallmarks of standard form letters. Paragraphs 5 to 8 of each letter, which include the statement relied upon by the Applicant, are exactly the same.

19. The Tribunal is not satisfied on the basis of these letters that the Applicant specifically turned its attention to the issue of forfeiture with reference to the facts and circumstances of the Respondent's case, and that the landlord in fact had forfeiture proceedings in mind as the reason for the relevant expenditure. No witness statement of fact has been provided, for example, from a director of the Applicant company, to this effect.

20. The Tribunal is not satisfied on the balance of probabilities on the facts of this case that the costs claimed were incurred for the purpose of or incidental to the preparation and service of a notice under sections 146 and/or 147 of the 1925 Act, rather than solely for the purpose of debt recovery.

21. The Tribunal therefore finds that the sums claimed are not recoverable as an administration charge pursuant to clause 3(f) of the Respondent's lease.

Name: Judge N Hawkes **Date:** 13 November 2019

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).