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Southern Rent Assessment Panel and Leasehold Valuation Tribunal

Case No. CHI/00ML/LAC/2012/0004

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL
SCHEDULE 11 COMMONHOLD & LEASEHOLD REFORM ACT 2002
SECTION 20C LANDLORD & TENANT ACT 1985

Property:	Top Floor Flat, 13 Cromwelll Road, Hove BN3 3EA
Applicant:	Ms Sally Hinshelwood (tenant) (ODT Solicitors)
Respondent:	Thornton Properties Limited (landlord) (Healys LLP Solicitors)
Application:	17 February 2012
Directions:	17 February 2012
Consideration:	06 June 2012
Decision:	06 June 2012

Member of the Leasehold Valuation Tribunal

Ms J A Talbot MA

Ref: CHI/00ML/LAC/2012/0004

Top Floor Flat 5, 13 Cromwell Road, Hove BN3 3EA

Application & Background

1. Two applications were received on 17/02/2012 from the tenant's solicitors for determinations in respect of (1) legal costs of £900, being solicitors' costs of Healys LLP and (2) an order under s20C of the 1985 Act. In her statement of case the applicant further requested that fees of former managing agents Jacksons or £23.50 and legal fees of Dean Wilson LLP solicitors of £184 should also be included in the application.

2. Directions were issued on 17/02/2012 requiring the applicant to provide a statement of case together with all documents upon which she intended to rely, and for the respondent to provide a statement in reply giving reasons for opposing the application. Both parties complied with the Directions.

3. In the application, Pepper Fox Limited were cited as managing agents for the landlord Thornton Properties Limited. They confirmed by letter dated 13/04/2012 that they were not dealing with the matter before the LVT because it concerned legal costs demanded before they took over management. However, they were previously involved in correspondence. Healys produced the response to the applicant's statement of case. Dean Wilson acted for the landlord in 2011.

Jurisdiction

4. The tribunal has the power, under paragraph 1(1) of Schedule 11 to the 2002 Act, to decide about liability to pay administration charges and can interpret the lease where necessary to resolve disputes and uncertainties. Administration charges are sums of money payable by a tenant to a landlord, as part of or in addition to the rent, in respect of: a grant of, or application for, approvals; provision of information or documents; late payments; and breach of covenant. The tribunal determines whether a service charge is payable, and if so, by whom, to whom, how much and when. A variable charge is only payable to the extent that it is reasonable; variable means neither specified in the lease nor calculated in accordance with a formula in the lease.

Lease

5. The tribunal had a copy of the lease of the flat (flat five on the third floor of the building). It is dated 6 June 1989 and is for a term of 99 years from 25 March 1989 at an initial ground rent of £50 and rising thereafter.

6. Under clause 3(9) of the lease (not 2(9) as stated in the application form), the tenant covenants "to pay to the Lessors all costs charges and expenses including Solicitors' Counsels' and Surveyors' costs and fees at any time during the said term incurred by the Lessors in or in contemplation of any proceedings in respect of this Lease under Sections 146 and 147 of the Law of Property Act 1925 or any re-enactment or modification thereof including in particular all such costs charges and expenses of and incidental to the preparation and service of a notice under

the said Sections and of and incidental to the inspection of the Demised Premises and the drawing up of any Schedule of Dilapidations such costs charges and expenses as aforesaid to be payable notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court".

7. The tenant's service charge contribution is 20% of the lessor's total expenditure in carrying out its obligations to maintain and insure the building. The interim charge and service charge are payable as provided in the Fifth Schedule (which does not require setting out here for the purposes of this application). Both charges are "recoverable in default as rent in arrear" under clause 4(4).

Consideration

1. Neither party objected to the matter being dealt with without a hearing. Accordingly the application was determined on the basis of written representations by a lawyer chairman. I carefully considered all the representations and supporting documents. I did not inspect the property.

Facts

2. The facts can be briefly stated. The applicant, Ms Hinshelwood, is the leasehold owner of the flat in question. She provided a witness statement setting out the background. At the material time, Jacksons were the managing agents. On 21/01/2010, Jacksons sent a demand for £1,750.80, being service charges of £862.90 due on both 25/12/2008 and 24/06/2009, and ground rent of £25. It is not clear whether this was the first time these sums had been demanded. The demand was accompanied by the summary of tenants' rights and obligations.

3. On 16/02/2010 Healys wrote to Ms Hinshelwood requiring payment of "outstanding maintenance charges" of £1,774.30. This included Jackson's "arrears fee" of £23.50. She wrote to Healys disputing the charges. She sought advice and had several conversations with Gary Pickard of Jacksons in relation to both the interim demands and subsequent anticipated service charge expenditure on proposed major works. Following meetings with the lessees Jacksons wrote on 13/04/2010 demanding £6,702.50, being the previous amount plus £4,952.90 for the major works (this is contained in an "arrears schedule" but there is no demand in the papers). A s20 consultation procedure commenced.

4. Ms Hinshelwood continued to dispute the service charges because she found errors in the major works costings, and did not receive assurances that the landlord (which owns 3 of the flats) would contribute its share. The landlord attempted to sell the property at auction without success. Later, on 26/01/2011, she received an email and demand from Jacksons with different amounts for the major works (two lots of £4,256.10) and £900 for Healys legal fees. An attached demand states: "Healys re S146/147" (which appears twice). The total amount said to be due was £11,161.50. On 28/02/2011, Jacksons ceased management of the property. Just before that, on 25/02/2011, she received a final demand from them including £900 for "Healys re S146/147". It is not clear whether this was accompanied by the statement of rights and obligations.

5. Meanwhile, it appears that Healys were pursuing the service charges by writing to Ms Hinshelwood's mortgagee, Abbey National She received two letters from Abbey dated 01/04/2010 and 10/04/2010 - asking if she agreed to different sums - £1,749.30 and £6,094.10 respectively – being added to her mortgage account. She replied that she did not agree because she was in discussion with Jacksons regarding the amounts. She wrote again to Abbey on 15/02/2011 disputing the legal fees.

6. In March 2011, Pepper Fox Limited (PFL) took over management. They instructed Dean Wilson LLP who wrote on 04/05/2011 demanding arrears of £12,158.70. This included their legal fees of £184 and PFL's administration charges of £180. It appears Dean Wilson also wrote to Abbey. After this, Ms Hinshelwood asked Abbey to pay the arrears, as she did not have the funds to pay, and on 14/06/2011 Abbey confirmed payment of £12,158.70 which has been added to her mortgage account. PFL have since refunded £180.

7. Ms Hinshelwood subsequently instructed Osler Donegan Taylor (ODT) who advised her that the landlord was not entitled to recover legal fees under the lease terms. Both Ms Hinshelwood and ODT have asked PFL for a breakdown of their charges, a copy of Healy's invoice and an explanation of why the sums are payable under the lease. This information was not provided before this application was made.

The Applicant's case

8. ODT have argued that the legal fees are not recoverable under the terms of the lease. They submitted that the fees are administration charges within paragraph 1(1)(d) of Schedule 11 to the 2002 Act. The demand for payment was not accompanied by the required summary of rights and obligations so the applicant is entitled to withhold payment. No breakdown of costs had been supplied on reasonable request. The sum claimed was excessive.

9. If the respondent was relying on the lease term regarding s146 costs, ODT submitted that all the fees were incurred in seeking to collect service charges from either the applicant and/or Abbey National. They were not incurred "in or in contemplation of any proceedings in respect of this Lease under sections 146 and 147 of the Law of Property Act 1925".

10. In any event, ODT argued that as the service charges are recoverable as arrears of rent, they are deemed as rent, so that no s146 needs to be served (*Escalus Properties Ltd v Robinson [1996]*). ODT sought to distinguish *69 Marina, St Leonards on Sea v Oram [2011]* because in that case the freeholders had incurred substantial legal fees bringing LVT proceedings to determine the lessees' liability for major works, and their costs were incidental to the preparation and service of s146 notices, whereas in the present case, the fees relate to letters written with a view to collecting service charge arrears.

The Respondent's case

11. The response to the applicant's statement of case was produced by Healys, the firm whose fees are the subject of this application (the response is somewhat

curiously pleaded in the form of a defence, which is usual in court proceedings, but not appropriate in the LVT, where a straightforward statement of case is to be expected, as was directed). As such the respondent's case is not easy to follow. It seems that the respondent accepts that all the fees – Healys, Dean Wilson and Jacksons – were incurred in seeking to collect service charge arrears for the flat.

12. Healys state that "it can neither be admitted nor denied whether the summary of rights and obligations ... was served or not" because Jacksons "has not confirmed or denied that the summary was sent". However, Healys contend that the summary is not required where a "statement" rather than a "demand" has been served.

13. Healys rely on the s146 provision in clause 3(9) so that the respondent is entitled to recover the "administration and/or legal fees incurred as a result of breach of the Lease". However, no breach is specified and no further explanation is given as to why clause 3(9) is relied on. The case of *Oram* is referred to as authority for the proposition that the s146 procedure applies in cases of non-payment of service charge even when such charge is recoverable as part of the rent.

14. In a witness statement, Mr Simon Caplin, property consultant employed by the landlord, explained that Jacksons instructed Healys after serving service charge demands and writing to the applicant in January 2010. Healys charging rate was £200 plus VAT per hour for partner Mr Taylor and £151 plus VAT for solicitor Ms Catuara. Mr Caplin supplied three invoices totaling £1,044.80 plus VAT. In January 2011 Healys agreed to reduce the fees to £900 inclusive of VAT.

15. A computer printout shows the work done by Healys comprised reviews of the lease and demands, correspondence to the applicant, liasing with Jacksons (mainly by email), drafting Particulars of Claim, and correspondence with Abbey. Also shown is time charged for perusal, research and internal memos.

Decision

16. The only possible term under the lease for the recovery of the disputed costs is the s146 provision at clause 3(9). There is no separate or explicit provision entitling the lessor to recover legal costs by way of service charges.

17. I have no difficulty in accepting ODT's submission that all the costs are variable administration charges within the meaning of Schedule 11 to the 2002 Act. I further accept that the charges were incurred (and this does not seem to be disputed) in seeking to recover service charges. They were plainly not incurred in preparing or serving a s146 notice, as one was neither prepared nor served. As far as can be ascertained from the breakdown, no work was done in contemplation of such a notice.

18. The preparation of draft particulars of claim might arguably be in contemplation of proceedings *following* service of a s146 notice, but in my view, to prepare particulars of claim in January 2010 was at best premature and at worst unnecessary, given that there was an ongoing *bona fide* dispute about the service charge, the cost of the major works, and the s20 consultation process. In any event, no legal action has been commenced in the County Court. It is settled

law that, whether or not service or administration charges are reserved as rent, under s61 Housing Act 1996, legal action for forfeiture for non-payment of service charges cannot be brought by a landlord until the amount of the charge has been determined by a court or LVT or otherwise admitted by the tenant. For this reason it is now unusual, in my experience, for a landlord or its solicitors to approach a mortgage lender direct for payment, where there is an ongoing *bona fide* dispute, and I am somewhat surprised that Healys took this step, just weeks after the service of the first service charge demands.

19. Further, I have no difficulty in distinguishing the case of *Oram* for the reasons given by ODT. I give weight to the fact that in that case the landlord brought legal proceedings in the County Court and the LVT following service of s146 notices and disrepair schedules and incurred substantial costs in those proceedings. In this case, the LVT application has been brought by the tenant because both she and her solicitors were unable to resolve the dispute through correspondence.

20. On the balance of probabilities, I find it more likely than not, that no summary of rights and responsibilities in respect of administration charges (as required by paragraph 4(3) of Schedule 11) was served with the demand of 26/01/2011, with the result that the applicant was entitled to withhold payment (even though in the event the amount was paid by Abbey).

Determination

21. The applicant is not liable to pay administration charges of £900 legal fees (Healys), £184 legal fees (Dean Wilson) and £23.50 administration charges (Jacksons).

Section 20C

22. The applicant sought an order pursuant to s20C of the 1985 Act that the costs incurred by the landlord in connection with the proceedings before the tribunal should not be taken into account in determining the amount of any service charge payable by the tenant. The Act provides that the LVT may make such an order as it considers just and equitable in the circumstances. The LVT is concerned with the merits rather than the quantum of any such costs.

23. I took into account that the applicant has wholly succeeded in this application, and that not until the LVT application was made and the respondent's reply provided was any explanation or breakdown given for the disputed legal costs. Both the applicant and her solicitors have attempted to resolve this matter in correspondence but have been unable to do so because the respondent, its successive agents and solicitors failed to respond to requests for information.

24. I therefore make the order as sought.

Dated 6 June 2012

Ms J A Talbot MA, Lawyer Chairman