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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**: CHI/00HD/LAC/2015/0004**
Property	**: 64, Shepherds Walk, Bradley Stoke, Bristol, BS32 9AY**
Applicant	**: Mr Alistair Moody**
Representative	**:**
Respondent	**: Fairhold Freeholds No 2 Limited**
Representative	**: J B Leitch, solicitors**
Type of Application	**: Administration charges**
Tribunal Members	**: Judge D. Agnew**
Date and venue of Hearing	**: Paper determination on 4th August 2015**
Date of Decision	**: 5th August 2015**

DECISION

Background

1. On 31st March 2015 the Applicant made an application to the Tribunal for a determination under paragraph 5(1) of Part 1 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the Act") as to the liability for and reasonableness of administration charges. The charges were levied on behalf of the Applicant's landlord (the Respondent) under a lease dated 21st December 2006 and made between Wilson Connolly Limited (landlord), Peverel OM Limited (the management company) and the Applicant (lessee). The Respondent acquired the freehold reversion in 2008 and appointed Estates and Management Limited ("E and M") as its agent to perform the landlord's obligations under the lease and to demand and collect ground rent.

2. The administration charges in question originally comprised one charge of £50 for E and M to seek payment of £50 ground rent unpaid on the due date, namely 1st August 2014. It was this charge in respect of which the Applicant sought a determination from the Tribunal as specified in his application form dated 31st March 2015. However, prior to the issue of the application, a further administration charge had been levied on 13th March 2015 in the sum of £150 and on 19th March 2015 the Respondent's solicitors sought to charge the Applicant £180 for seeking recovery of ground rent and the landlord's agent's administration charges. The Applicant in his statement of case has asked the Tribunal to determine his liability to pay these further charges. The Respondent seeks to exclude these further charges from the determination on the basis that they were not included on the application form and so the Applicant must be taken to have accepted them.

3. The Applicant also asks the Tribunal to order, if E and M and the Respondent's solicitors fees are payable by him for an order to be made under section 20C of the Landlord and Tenant Act in respect of them.

The facts

4. The facts in this case are not in dispute. It is accepted by the Applicant that he failed to pay the half-yearly ground rent payment of £50 due on 1st August 2014. The chronology as to what happened thereafter is as follows:-
   27th November 2015: the Applicant received a "Final letter before action" from E and M dated 14th November 2014, demanding the £50 ground rent plus £50 administration charge.
   27th November 2014: the Applicant immediately wrote to E and M explaining that he had moved home in August 2013, had informed the management company of his new address, that he had not received a ground rent demand, that he enclosed a cheque for the outstanding ground rent but that he disputed the £50 administration charge.
   4th December 2014: E and M returned the Applicant's £50 saying that they required payment in full. They referred to clause 4 of the lease which, they said "clearly states that you are required to pay any additional costs following late payment."

23rd December 2014: the Applicant maintained his challenge to his liability for the administration charge and once again sent a cheque for the outstanding ground rent asking E and M to accept this even if the discussion concerning the administration charge was to continue. At some point this is returned to the Applicant but this is not received prior to 24th January 2015.
1st January 2015: E and M issue a demand for the ground rent due on 1st February 2015
24th January 2015: the Applicant sends E and M a cheque for £50 for the ground rend due on 1st February 2015.
27th January 2015: this cheque is returned to the Applicant as not all the amounts they have been demanding have been paid.
19th March 2015: J B Leitch, solicitors instructed by E and M write to the Applicant to demand payment of £300 for ground rent and fees and £180 for their costs.
31st March 2015 the Applicant sends his application form to the Tribunal.

The law

5. Paragraph 5 (1) of Schedule 11 Part 1 to the Act states that:-
"An application may be made to a [First-tier Tribunal (Property Chamber)] 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
(e) the manner in which it is payable

6. Paragraph 1(1) of the 11th Schedule Part 1 of the Act states that:-
"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) and (b) not relevant
(b) in respect of a failure by the tenant to make a payment by the due date to the landlord.....
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease."

7. Section 20C of the Landlord and Tenant Act 1985 provides that –
"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 [First-tier Tribunal (Property Chamber)].....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.

The lease

8. The relevant lease provisions are as follows:-
"4. The Lessee for the mutual protection of the Lessor the Manager and the lessees of the Properties hereby covenants:
4.1 With the Lessor to observe and perform the obligations on the part of the Lessee set out in Parts One and Two of the Eighth Schedule and to observe and perform all covenants and stipulations contained or referred to in the Charges Register (if any) of the Title above referred to so far as the same relate to or affect the Demised premises and to indemnify the Lessor against all actions proceedings costs claims and demands in respect of any breach non-observance or non-performance thereof."

9. Paragraph 1 of Part One of the Eighth Schedule contains a covenant by the Lessee:_
" To pay to the Lessor or its authorised agent the Rent hereinbefore reserved on the days and in the manner herein provided and without deduction or set-off and free from any equity or counterclaim."

10. Paragraph 4 of the Eighth Schedule Part 1 to the lease requires the Lessee:
"To pay all costs charges and expenses (including legal costs and fees payable to a Surveyor) incurred by the Lessor in or in contemplation of any proceedings or service of any notice under Sections 146 and 147 of the Law of Property Act 1925 including the reasonable costs charges and expenses aforesaid of and incidental to the inspection of the Demised Premises the drawing up of schedules of dilapidations and notices and any inspection to ascertain certain whether any noticehas been complied with and such costs charges and expenses shall be paid whether or not forfeiture for any breach shall be avoided otherwise than by relief granted by the Court."

11. Paragraph 7 of the Eighth Schedule Part 1 provides for the Lessee:-
"To pay and discharge all rates taxes assessments charges duties and other outgoings whatsoever whether parliamentary parochial or of any other kind which now are or during the Term shall be assessed or charged on or payable in respect of the Demised premises or any part thereof or by the landlord tenant owner or occupier thereof...."

12. By section 166 of the Act:
"(1) A tenant under a long lease of a dwelling
is not liable to make a payment of rent under the lease unless the landlord has given him a notice relating to the payment and the date on which he is liable to make the payment that is specified in the notice.

(6) If the notice is sent by post, it must be addressed to the tenant at the dwelling unless he has notified the landlord in writing of a different address in England and Wales at which he wishes to be given notices under this section (in which case it must be addressed to him there)."

The Applicant's case

13. The Applicant's case was that he had moved house from 10, Campbell Road, Plymouth, to 16, Northlands Gardens Southampton in August 2013. The Management Company, Peverel OM Limited were aware of his change of address and, indeed had sent him service charge demands to that address. He did not receive the demand for ground rent sent by E and M to his Plymouth address in July 2014 and so that ground rent payment was not made by the due date. The first communication he received (at his Southampton address) about this ground rent was a letter from E and M dated 14th November 2014 and headed "Final Letter Before Action". By that letter not only was the £50 ground rent demanded but also a sum of £50 for E and M's administration charges in chasing payment.

14. The Applicant immediately wrote to E and M enclosing a cheque for the ground rent of £50 but disputing the administration charge. The Applicant's first argument was that nowhere in his lease did it say that he had to pay an administration charge for late payment of ground rent. Secondly, £50 for a standard printed letter was not a reasonable charge. He asked for E and M's authority for stating that he was obliged to pay the administration charge.

15. E and M replied by letter dated 4th December 2014 returning his cheque which was returned "as there is an outstanding balance on your account of £100." E and M said that it was the Applicant's responsibility to keep the freeholder up to date with the correct billing address. They drew attention to what they said was clause 4 of the lease (attached) but in fact what was attached was the Eighth Schedule to the lease of which paragraph 4 was relevant as to what the Lessor could charge the Lessee.

16. The Applicant wrote to E and M on 23rd December 2014 enclosing another cheque for the ground rent and querying why sections 146 and 147 of the Law of Property act 1925 were relevant to his case. This cheque was subsequently returned again by E and M as was a further cheque, this time for the ground rent due on 1st February 2015.

17. The Applicant challenges the right of E and M on behalf of the Respondent to claim all the administration charges claimed notwithstanding that only the first £50 charge was mentioned in his application form. He says that he understood that the other charges would have come under the request for an order under section 20C of the 1985 Act. In a nutshell his case is:-
    a. the demand for ground rent was not sent to his last known address
    b. the demand was not sent by registered post
    c. the lease only provides for administration charges in respect of section 146 and 147 of the Law of Property Act 1925. No section 146 notice has been served and the amount owed was below the £350 threshold for forfeiture action.

d. if an administration charge is payable the amount claimed is excessive for what was done and there is no evidence that land registry documents were obtained
e. the file preparation and instruction of solicitors charges (£150 in total) and the solicitors' fees (£180) should be regarded as associated with bringing legal proceedings and should therefore come under section 20C of the 1985 Act.

The Respondent's case

18. The Respondent's solicitors clarify that what E and M on behalf of the Respondent freeholder seek to recover from the Applicant is as follows:-
14.1.14 Administration charge £50
13.3.15 Administration charge £150
19.3.15 Solicitors' fees £180.
The £150 charge is made up as to ££60 file preparation for solicitors and £90 instruction of solicitors.
They say that the outstanding ground rent of £100 was paid to J B Leitch after issue of the current application.

19. The Respondent says that the ground rent for 1st August 2014 was demanded on 27th June 2014. The demand was sent to the address that the Respondent had for the Applicant in Plymouth. Notification of change of address to Peverel OM Limited was not sufficient to notify the landlord of a change of address for ground rent purposes. The landlord's agent for collection of the ground rent is not the same as the management company. It is the Applicant's responsibility to pay the ground rent on time and to ensure that the landlord has his up to date billing address. It is not a requirement that the ground rent demand be sent by registered post. E and M discovered the Applicant's up to date address by carrying out a search against the subject property at the Land Registry. The administration charges levied are its standard charges and lessees are notified on the invoices that a charge of £50 will be made for late payment. The Applicant's cheques were returned because they did not amount to the outstanding account. The administration charges are reasonable. It relies on the provisions of the lease quoted at paragraphs 8 to 11 above as authority for claiming the administration charges in question. It says that section 20C of the 1985 Act is not relevant to administration charges.

The Tribunal's decision

20. The Tribunal does not consider itself constrained to make a determination restricted to dealing with the first administration charge of £50. Whether or not the Applicant thought that the subsequent charges came under the aegis of his section 20C application, he made it perfectly clear in his statement of case that all the administration charges were being challenged. The Respondent was therefore well aware of that fact and has addressed those issues. It has not therefore been prejudiced and the most sensible course for the Tribunal to take is to include all the outstanding administration charges in this decision.

20. The next matter for the Tribunal to decide is whether the Applicant was late in paying the August 2014 instalment of ground rent, for, if he was not, there should be no question of him having to pay an administration charge. The Applicant says that section 166 of the Act had not been complied with because it was not sent to him at the address he had supplied to Peverel OM Limited and it was not sent by registered post. On these points the Tribunal finds in favour of the Respondent. The giving of the new address to the management company is not the same as giving the information to the landlord. In this case, the management company is not the agent of the landlord. It is a party to the lease in its own right and it has its own obligations for maintenance and repair for which it is reimbursed by the Lessees by way of a service charge. The distinction may well not have been appreciated by the Applicant but that is the case in law. Furthermore, section 166 of the Act provides the mechanism for the service of demands for rent. They are to be sent to the subject property unless the tenant has given the landlord a different address, in which case the demands are to be sent there. In this case, the Applicant had notified the landlord of his Plymouth address and until such time as he notified the landlord of a change of that address the landlord was obliged to have the ground rent demands sent to that address. Subsection (6) of section 166 does not require the demand to be sent by recorded delivery. The Tribunal accepts the Respondent's argument that this subsection provides a "contrary intention" to the general position under section 196 of the landlord and Tenant act 1925. The demand need only be sent by post (not necessarily registered post) under section 166(6) of the Act. Accordingly, the Tribunal finds that the demand was properly sent to the Applicant's Plymouth address in June 2014 and that, consequently the ground rent payment was late once 1st August 2014 had passed.

21. The next question the Tribunal addressed was whether the lease entitled the Respondent to make an administration charge in chasing an overdue payment of ground rent. There are three possible provisions in the lease that have been cited by the Respondent as providing that authority. Two of them can be ruled out fairly easily as not being capable of providing the requisite authority.

22. First, the Tribunal considered paragraph 7 of the Eighth Schedule Part 1 to the lease
This paragraph is concerned solely, in the Tribunal's view, with outgoings payable to a third party in relation to the property and is not capable of being construed as covering a cost incurred by the landlord's agent in collecting in overdue ground rents.

23. Paragraph 4 of the Eighth Schedule part 1 to the lease refers to the landlord recovering its costs incurred in or in contemplation of proceedings or notices under section 146 or 147 of the Law of Property Act 1925. As the Applicant pointed out in correspondence with E and M, section 146 is dealing with a requisite notice before commencing forfeiture proceedings. No such notice is required before forfeiture for breach of covenant to pay rent (section 146(11)). Furthermore, no forfeiture proceedings may be taken where the amount of rent owed is

less than £350 (section 167 of the Act and Rights of Entry and Forfeiture (Prescribed Sum and Period) (England)(Regulations) 2004). Consequently, it was not possible for the Respondent to have contemplated forfeiture proceedings at the time when these charges were said to have been incurred under paragraph 4 of the Eighth Schedule. The charges could not therefore have been authorised by that paragraph.

24. That leaves clause 4.1 as the only possible clause authorising administration charges for failure to pay ground rent. There is no specific reference in this clause to charges for late payment of ground rent or any other payment due. If E and M were referring to this clause as opposed to paragraph 4 of the Eighth Schedule when they referred the Applicant to clause 4 of the lease (when they attached the Eighth Schedule to their letter of 4th December 2014 instead of page 9 of the lease which includes clause 4) then it is hardly the case that it "clearly states that you are required to pay any additional costs following late payments" as E and M suggest in that letter. Indeed, on a proper construction of that clause, the Tribunal does not agree with the Respondent that this gives authority for administration charges for late payment of ground rent to be levied for the following reasons.

25. In *Assethold Limited v Mr N M Watts [2014] UKUT 0537 (LC)* the Deputy President, commenting upon cases such as *Sella House Limited v Mears [1989] 1EGLR 65* and *Gilje v Charlegrove Securities [2002] 1EGLR 41* stated that:-
"I accept that, as a general principle of interpretation, if contracting parties intend that a payment obligation such as a service charge should cover a particular type of expenditure they will wish to make that clear. Unclear language should therefore be read as having a narrower rather than a wider effect" Nonetheless, I do not think that principle should be pushed to the point where language which was clearly intended to encompass expenditure in a wide variety of situations which the parties have not explicitly catalogued should be so restrictively construed as to deprive it of any real effect. It seems to me wrong in principle to start from the proposition that, with certain types of expenditure, including the cost of legal services, unless specific words are employed no amount of general language will be sufficient to demonstrate an intention to include that expenditure within the scope of a service charge. Language may be clear, even though not specific."

26. The Tribunal had at the forefront of its mind when construing clause 4.1 of the lease in the instant case, that specific wording relating to administration charges for late payment was not necessarily required in order for a charge to be levyable. However, the Tribunal considered that the general wording of that clause was not sufficient to encompass such charges. In construing the words "indemnify the Lessor against all actions proceedings costs claims and demands" the Tribunal considered that they had to be construed ejusdem generis and that this clause was designed to protect the Lessor from claims made against it, that it was defensive in nature and was not intended to apply to situations where the lessor took the initiative and instigated action against the lessee.

27. The Tribunal also had regard to the lease as a whole and considered that if the landlord had intended to be able to levy administration charges for late payment of ground rent that this would have been included within the Eighth Schedule as specific reference to legal costs was made in paragraph 4 thereof.

28. The Tribunal was mindful that the case of *Christoforou and Diogenous v Standard Apartments Limited [2013] UKUT 0586 (LC)* involved a lease with a clause similar to that in the instant case. That clause read as follows:-

"To be responsible for and to keep the Landlord fully indemnified against all damage, damages, losses, costs, expenses, actions, demands, proceedings, claims and liabilities made against or suffered or incurred by the landlord arising directly or indirectly out of –
Any act, omission or negligence of the Tenant or any person at the Premises expressly or impliedly with the Tenant's authority
Any breach or non-observance by the Tenant of the covenants conditions or other provisions of this lease or any of the matters to which this demise is subject."

29. In that case the administration charges for recovery of unpaid service charges from the lessees was recoverable. This Tribunal considers, however, that the wording of the relevant clause in the lease quoted at paragraph 28 above, although similar to clause 4 in the instant case, is far more detailed and more clearly applicable to the recovery of such charges. It makes it clear, that included within its ambit are costs "suffered or incurred by the lessor" and not just claims made against the lessor.

30. Furthermore, clause 4.1 provides an indemnity for the landlord. For an indemnity to apply, the landlord must have a liability to pay the costs incurred by the agents E and M. In the instant case there was no evidence that, if the Applicant did not pay E and M's charges, the landlord would have to do so. Absent such evidence, the Tribunal considered that clause 4.1 of the lease could not apply.

31. For the foregoing reasons the Tribunal determines that the Applicant has no liability under his lease to pay any of the administration charges sought by E and M, specifically the £50 charge of 14th November 2014, the £150 charge of 13thMarch 2015 or the £180 solicitors' fees of 19th March 2015. That means that it is unnecessary for the Tribunal to consider whether section 20c of the Landlord and Tenant Act 1985 would have been applicable to those charges in this case had the Tribunal found to the contrary. Had it been appropriate to do so, however, the Tribunal would have found that section 20C has no relevance to administration charges levied as that section prevents, if an order is made, costs of proceedings being added to service charges. All the administration charges levied were in respect of matters arising prior to the issue of these proceedings.

32. The Tribunal would conclude by making an observation that this whole application could well have been avoided had E and M taken a more reasonable approach to this matter. At the outset they were aware that the Applicant had been a regular payer of ground rent for many years. They were aware from 28th November 2014 or thereabouts that the applicant had moved house and that he had notified Peverel OM Limited of his change of address. Immediately he received the letter of 14th November 2014 he tried to pay the outstanding ground rent which was only £50. It is a mystery why they did not accept the two tendered payments of ground rent. They were never going to be able to forfeit the lease for non payment of the disputed administration charge. The further administration charges were sought because they simply pressed on with their procedures and failed to appreciate that there was a legitimate challenge to the right to levy the charge. The Tribunal considers that the Applicant has acted entirely reasonably throughout. In all the circumstances the Tribunal considers that it is just and equitable for it to order that the Respondent reimburse the application fee paid by the Applicant in the sum of £65 to be paid within 28 days and so orders.

Dated the 5th day of August 2015

Judge D. Agnew (Chairman)

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.