13108

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BA/LSC/2018/0258**
Property	:	**200e St James's Road, Croydon CR0 2BW**
Applicant	:	**J H Watson Property Investment Limited**
Representative	:	**Ms Afia Riaz, credit controlling adviser**
Respondent	:	**Mr Adedayo Badejo**
Representative	:	**In person**
Type of Application	:	**For the determination of the liability to pay a service charge**
Tribunal Members	:	**Judge P Korn** **Mr A Lewicki FRICS**
Date and venue of Hearing	:	**25th October 2018 at 10 Alfred Place, London WC1E 7LR**
Further written submissions by	:	**8th November 2018**
Date of Decision	:	**7th December 2018**

DECISION

Decisions of the Tribunal

(1) The service charge element of the claim in the sum of £592.82 is payable in full.

(2) The administration charges, in the sum of £610.40, are not payable at all.

(3) We make no cost order under paragraph 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

(4) The case is transferred back to the County Court for final disposal.

Introduction

1. The Applicant seeks and, following a transfer from the County Court, the Tribunal is required to make (a) a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("**the 1985 Act**") as to the payability of certain service charges and (b) a determination pursuant to Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("**the 2002 Act**") as to the payability of certain administration charges levied by the Applicant.

2. The amounts at issue are £592.82 by way of service charges and £610.40 by way of administration charges. The disputed service charges are calculated by taking the total interim service charge demanded for the period 1st January to 31st December 2017 (£1,063.84) and deducting the credit brought forward (£321.02) and the payment of £150.00 received by the Applicant on 13th February 2017.

3. The disputed administration charges comprise the following sums less a payment of £100.00 received by the Applicant:-

Date demanded	Description	Amount
13.01.2017	First reminder administration charge	£12.00
13.01.2017	Second reminder administration charge	£49.20
22.02.2017	Final reminder administration charge	£70.80
22.02.2017	Notice to client	£24.00

	administration charge	
10.03.2017	Apply to court administration fee	£181.20
13.04.2017	First reminder administration charge	£12.00
13.04.2017	Second reminder administration charge	£49.20
26.04.2017	Final reminder administration charge	£70.80
26.04.2017	Notice to client administration charge	£24.00
11.05.2017	Apply to court administration fee	£181.20
22.05.2017	Lender correspondence administration fee	£33.00
22.05.2017	Land Registry copy of Register of Title	£3.00

4. The relevant statutory provisions are set out in the Appendix to this decision. The Respondent's lease ("**the Lease**") is dated 17th June 1988 and was originally made between Anthony Peter Simmonds and Geoffrey Lionel Simmonds (1) and Christopher Alan Norton (2). The Respondent is the current leaseholder and the Applicant is his current landlord.

Respondent's position

5. In written submissions, the Respondent lists certain items which he claims have been wrongly charged to his account since August 2012 and which need to be refunded to him. He also objects to having been charged a series of administration fees since February 2014 and to the Applicant having levied a series of interest charges.

6. In addition, the Respondent objects in written submissions to certain charges for general repairs and maintenance and to the amount being

paid to insure the building. He also comments that no invoices have been produced for these items.

7. At the hearing, the Tribunal asked the Respondent what documentary or other evidence he had to support his position but he did not produce or refer to any evidence.

Applicant's case

8. In written submissions, the Applicant states that the unpaid service charges are due under the terms of the Lease. It refers the Tribunal to its Period End Statement for 2017 and its Service Charge Estimate for 2018. Breaking down the service charge into its constituent elements the Applicant gives some details of the different categories of service provided, namely cleaning of the common parts, common parts electricity, general maintenance and repair (including an annual maintenance contract), refuse management, building insurance, account certification and overall management (charged via a management fee).

9. The Applicant has provided various copy invoices, and it submits that the cost of all of the services is recoverable under the terms of the Lease and is reasonable in amount.

10. In relation to the administration charges, the Applicant submits that they are all recoverable under clause 3(6) of the Lease, which provides for the recovery of all costs, charges and expenses for the purpose of or incidental to or in contemplation of any forfeiture proceedings. It states that the Respondent has been made aware in correspondence and "in previous Tribunal matters" and by being provided with a copy of the Applicant's Credit Control Policy & Procedure that all actions taken by the Applicant in pursuing service charge arrears are in contemplation of forfeiture of the Lease. The Applicant also stated its intention of forfeiting the Lease in its County Court claim form in this case.

11. At the hearing, Ms Riaz explained that the service charge amounts claimed were only interim estimated amounts because final accounts were not due to be produced until February 2018, well after the date of the County Court claim. She also explained that the budget each year was based on previous actual charges and any anticipated unusual expenditure.

12. In relation to the administration charges which were connected to the chasing up arrears of service charges, Ms Riaz said that the first reminder was a courtesy letter, whilst the second reminder involved slightly more work and was dealt with by someone more senior. The scale of the Applicant's administration charges was set out in the Credit

Control Policy & Procedure of which the Respondent had been sent a copy.

13. Ms Riaz said that the Applicant's policy was not to charge an administration charge for chasing arrears if the arrears balance was below a certain level, but she accepted that this policy had not been applied consistently in this case, possibly because payments received had inadvertently been allocated to ground rents which were not yet due.

14. In relation to the charge of £181.20 dated 10th March 2017 and described as "Apply to County Court Administration Fee", that application to the County Court was not in fact made and Ms Riaz was unable to shed any light on why the associated work was actually carried out and billed for.

15. Ms Riaz said that the Respondent had been late in making payment for years and that the Applicant was indeed contemplating forfeiture proceedings.

Further comments by Respondent

16. The Respondent did not accept Ms Riaz's contention that he had been late in making payment for years. His account had generally been in credit, and the position was simply that he had not always paid at exactly the times requested, preferring instead – for his own budgeting reasons – to pay when he had money available to do so, even if this sometimes actually put him in credit.

Tribunal's analysis and determination

The service charges

17. The service charge amounts claimed are interim estimated amounts, and it therefore follows that the issue is not about the adequacy of any invoices or the quality of work done. Estimated service charges are not based on actual work done but rather are estimates of the cost of work to be done in the future. When the actual charges for the relevant period are known and have been communicated to the Respondent it will be open to him at that stage to challenge the actual charges if he feels that those actual charges are unreasonable.

18. Under section 19(2) of the 1985 Act estimated charges can (to paraphrase) be challenged on the basis that they constitute an unreasonable estimate of the actual reasonable cost of providing the services. The Respondent has not claimed that any of the charges are not recoverable in principle under the terms of the Lease. He has offered no evidence to support his assertion that some of the estimated

charges are unreasonable in amount and he has offered no evidence to support his assertions regarding other sums which he alleges are due to him. He had plenty of time to put together a proper statement of case but his actual statement of case is no more than a list of sums which he claims are due to him.

19. The Applicant has provided an explanation as to how estimated service charges are calculated and has explained the various categories of charge and referenced them to the Lease. It has also provided copy invoices which, whilst not strictly relevant to the level of the estimated charges, offer useful background information as to the level of actual charges which has not been effectively challenged by the Respondent.

20. In conclusion, the Applicant has done sufficient to show – in the absence of an effective challenge – that the estimated service charges in dispute are reasonable and fully payable, and the Respondent has not offered any proper arguments or evidence to counter the Applicant's position. Therefore, the disputed service charges are payable in full.

The administration charges

21. Under paragraph 5 of Schedule 11 to the 2002 Act an application can be made to a First-tier Tribunal for a determination as to whether an administration charge is payable and, if so, the amount which is payable. By virtue of paragraph 1(1)(c) of Schedule 11 to the 2002 Act, the term "administration charge" includes an amount payable by a tenant in respect of a failure by it to make a payment by the due date to the landlord and therefore includes the items being claimed in this case. Technically the application was made by way of a claim in the County Court, but it has been transferred by the County Court to the Tribunal.

22. The Applicant relies on clause 3(6) of the Lease to claim these administration charges, and clause 3(6) (including the relevant part of the introduction to clause 3) reads as follows:-

"The Lessee ... HEREBY COVENANTS with the Lessor ... To pay unto the Lessor all costs charges and expenses (including legal costs and fees payable to a Surveyor) which may be incurred by the Lessor in or in contemplation of any proceedings under Sections 146 and 147 of the Law of Property Act 1925".

23. The Applicant relies specifically on the reference to section 146, which relates to forfeiture. We note in this regard that the Applicant has included a reference to the contemplation of forfeiture proceedings in correspondence and in the County Court claim and in its Credit Control Policy & Procedure, but it is difficult to escape the conclusion that the Applicant has been doing so as a matter of routine in order to make the

administration charges fit within the wording of clause 3(6) of the Lease. There may be circumstances in which forfeiture proceedings are actually being contemplated, but the manner in which the Applicant has been including this wording in its documents suggests that no real distinction is being made between situations in which a payment reminder letter (for example) is genuinely being sent in contemplation of forfeiture proceedings and situations in which it is not. The problem is further compounded by the fact that the Applicant asserts that the Respondent has been in arrears for years and yet in our view the evidence before us does not bear this out.

24. In relation to the first and second reminders which are (curiously) both attributed to 13th January 2017, the hearing bundle does not contain copies of the relevant invoices, but more importantly these reminders seem to have been issued in circumstances where just a few days earlier (on 31st December) the Respondent was in credit by £321.02. Then on 13th February 2017 the Respondent was only in arrears by £122.10, of which £61.20 comprises what in our view are unreasonable administration charges for the two reminder letters referred to above. Then on 22nd February 2017, despite the very low arrears balance, the Respondent was charged £94.80 by way of administration charges for a 'final reminder' and a 'notice to client'. Then on 10th March 2017 there was a further charge of £181.20 described as 'Apply to County Court Administration Fee' even though no application was actually made to the County Court.

25. Then between 13th April and 22nd May 2017 there were further charges connected to the chasing of arrears amounting in aggregate to £373.20, but a large part of the alleged debt by this stage was the unreasonable administration charges which had already accumulated. In our view the frequency of chasing and the amount of the charges was out of all proportion to the relatively small amount of actual arrears, and the Applicant's whole approach was at best misconceived.

26. For a combination of all of the above reasons, including the fact that we are not persuaded that the charges have actually been incurred in contemplation of forfeiture proceedings, we consider that none of the administration charges is payable.

Cost Applications

27. The Applicant has made a cost application under paragraph 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("**Rule 13(1)(b)**"), the relevant part of which states as follows: *"The Tribunal may make an order in respect of costs ... if a person has acted unreasonably in ... defending or conducting proceedings in ... a leasehold case".*

28. In the Upper Tribunal decision in *Willow Court Management (1985) Ltd v Alexander (2016) UKUT 0290 (LC)* the Upper Tribunal considered, inter alia, what is meant by acting "unreasonably" and the issue of causation. In *Willow Court* the Upper Tribunal said that there had to be a causal link between the conduct and the costs incurred. It also said that whilst what constitutes acting unreasonably is fact-sensitive, the approach to be followed when determining whether conduct has been unreasonable is as set out in the case of *Ridehalgh v Horsfield (1994) 3 All ER 848.*

29. In *Ridehalgh v Horsfield* Sir Thomas Bingham MR described the acid test of unreasonable conduct in the context of a cost application as being whether the conduct permits of a reasonable explanation. This formulation was adopted by the Upper Tribunal in the case of *Halliard Property Company Ltd v Belmont Hall and Elm Court RTM Company Ltd LRX 130 2007* and (as noted above) in *Willow Court.* One principle which emerges from these cases is that costs are not to be routinely awarded pursuant to a provision such as Rule 13(1)(b) merely because there is some evidence of imperfect conduct at some stage of the proceedings.

30. Sir Thomas Bingham also said that unreasonable conduct includes conduct which is vexatious and designed to harass the other side rather than advance the resolution of the case, but that conduct could not be described as unreasonable simply because it led to an unsuccessful result. The Upper Tribunal in *Willow Court* added that for a lay person to be unfamiliar with the substantive law or with tribunal procedure or to fail properly to appreciate the strengths or weaknesses of their own or their opponent's case should not be treated as unreasonable. Tribunals should also not be over-zealous in detecting unreasonable conduct after the event.

31. The Applicant in this case points to failures on the Respondent's part to comply with directions and submits that the Respondent denied receiving certain documents whilst knowing that he had in fact received them, thereby attempting to prejudice the Applicant's position. The Applicant also states that the Respondent attempted at the hearing to introduce documents not previously provided to the Applicant and that this behaviour was unreasonable and was a deliberate attempt to ambush and undermine the Applicant's case. Furthermore, the Applicant argues that the Respondent's tactic of attending the hearing without a copy of the hearing bundle, despite having received it, was unethical and unreasonable. In addition, the Applicant suggests that the Respondent's failure to substantiate his case was itself also unreasonable. As a general point the Applicant adds (slightly opaquely): *"Work that a support staff would have done has had to be undertaken but Junior Staff level thus incurring additional cost".*

32. We note the Applicant's submissions and we accept that the Respondent has failed to comply with certain of the directions and has not acted in an exemplary manner in relation to these proceedings. However, offering a weak defence of his position does not itself constitute unreasonable conduct for the purposes of Rule 13(1)(b), and in our view the Applicant's own case was quite weak in relation to the administration charges, which is why we have found against the Applicant in relation to the payability of those charges.

33. The Respondent's failure to comply with directions is of more concern, as is his unconvincing denial that he received certain documents and his attempt to introduce new documents at the last moment. However, the Applicant has failed in our view to demonstrate a causal link between the Respondent's conduct and any increase in costs. The Respondent's attempt to introduce new documents at the hearing may have been irritating to the Applicant but it did not increase costs incurred. In relation to the Respondent's other failings, it is possible that these had an effect on costs incurred, but especially as the Respondent is a litigant in person and therefore needs to be given more leeway we would need stronger evidence **both** (a) that the conduct was unreasonable even for a litigant in person according to the test laid down in *Ridehalgh v Horsfield* and (b) that the particular conduct had a direct effect on the amount of costs incurred by the Applicant. Even then, we would also need clear evidence as to how much costs have been increased by the particular unreasonable conduct in question.

34. The way in which Rule 13(1)(b) has been interpreted by the Upper Tribunal deliberately sets quite a high bar, and on the facts of this case we consider that the Applicant has failed to get over that bar. We therefore decline to make a costs order under Rule 13(1)(b).

Name: Judge P Korn **Date:** 7th December 2018

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. 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.

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

D. 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.

APPENDIX

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service 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, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Commonhold and Leasehold Reform Act 2002

[See in body of decision]