11307

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AF/LAC/2015/0023**
Property	:	**Flat 9, Ravenscraig House, 2 Waratah Drive, BR7 5FR**
Applicant	:	**Alexander Ian Jackson**
Representative	:	**Cook Taylor Woodhouse, Solicitors**
Respondent	:	**E & J Ground Rents No.9 Limited**
Representative	:	**SLC Solicitors**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay Administration Charges**
Tribunal	:	**Mr M Martynski Mr I Holdsworth BSc MSc FRICS**
Date of Decision	:	**14 December 2015**

DECISION

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Decision summary

1. The Tribunal determines that the Administration Charges totalling £148.80arepayable but the Administration Charges in respect of legal fees totalling £222.00 are not payable.

2. An order is made pursuant to section 20C of the Landlord and Tenant Act 1985 as to half of the Respondent's costs.

3. The Respondent must pay to the Applicant the half the issue fee (total £32.50) within 28 days of the date of this decision.

Background

4. The Applicant owns the long lease of Flat 9, Ravenscraig House ('the Property').

5. The Applicant's application is dated 18 September 2015 and it seeks a determination in respect of the following Administration Charges which are set out in an arrears schedule dated 7 August 2015:-

Late payment charge	£49.20
Solicitor's referral costs	£99.60
Legal costs	£185.00
VAT	£37.00

6. Directions on the application were given on 28 September 2015. The directions set the matter down on the Paper Track to be determined on the papers alone. Neither party requested an oral hearing and accordingly we have determined the application on the basis of the papers in the tribunal file and those provided in a bundle by the Applicant's solicitors. The issues identified by the tribunal at the directions stage include; "*whether the administration charges which form the subject matter of this dispute are reasonable and payable by the leaseholder under the terms of his lease*".

The Applicant's case

7. The Applicant states that he has always resided at 13 Waratah Drive and that he purchased the leasehold interest in the Property (which is Ravenscraig House) giving 13 Waratah Drive as his address. He points to the fact that hisaddress set out in the lease for the Property is given as 13 Waratah Drive.

8. The Applicant further states that, following his purchase of the Property, service charges were demanded of him by email sent by the managing agents and he promptly paid those charges on demand.

9. The ground rent however was demanded by postal delivery to the Property. Demands were made in respect of ground rent for the years 2014 and 2015 (£250.00 per year). These demands, say the Applicant, did not come to his attention until 7 August 2015. Upon being made aware of the demands, the Applicant says that he contacted the Respondent's solicitors and offered to pay the ground rent in full plus interest at 12%. This offer was refused, the solicitors would only accept payment in full of the ground rent, interest and administration charges set out above, which they said, had been incurred due to the non-payment of the ground rent.

The Applicant's lease and address

10. The lease for the Property is dated 29 November 2013. It is for a term of 125 years from 1 June 2010. The address given for the Applicant in the lease is the address at 13 Waratah Drive.

11. The parties to the lease are: Taylor Wimpey UK Limited (as landlord), the Applicant (as leaseholder) and Chamonix Estates Limited (as management company). We presume that the freehold interest in the land comprising the Property was transferred to the Respondent prior to the issues arising in this case.

12. The rent stated as payable under the lease is £250 per year payable annually in advance on the 1 January in each year (as adjusted pursuant to later provisions in the lease – the first rent review takes place on the tenth anniversary of the commencement of the term granted by the lease).

13. In the Third Schedule to the lease, the Applicant covenants as follows:-

> 1.(a)(i) To pay the Maintenance Charge and the Rent on the days and in the manner herein provided without any deduction (whether by way of set off lien charge or otherwise) whatsoever
>
> 1.(a)(ii) That in the event of the Maintenance Charge or the Rent.............remaining unpaid five working days after the same shall have become due (whether formally demanded or not) the Buyer shall pay interest at the rate of 4 per cent per annum above the base rate of National Westminster Bank Plc.......
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> 11. To pay all expenses (including Solicitor's costs and surveyor's fees) incurred by the Company or the Management Company in the recovery of any arrears of maintenance charge or incidental to the preparation and service of any notice under section 146 of the Law of Property Act 1925 (or any statutory modification re-enactment or replacement thereof) notwithstanding that forfeiture is avoided (otherwise than relief granted by the Court)
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> 13. To indemnify and keep indemnified the Company against all damage costs and any other liabilities resulting from any non-observance or non-observance [sic] or non-performance by the Buyer or his under tenant of any covenants relating to the Property herein contained or on the registers contained or on the registers of the title above referred to

14. Clause 7.3 of the lease provides as follows:-

> that this Lease is made on the condition that if any sums payable hereunder shall at any time be in arrear or unpaid for 21 days after the same shall have become due ....then it shall be lawful for the Company to re-enter upon the Property.....and this demise shall thereupon absolutely determine.........

15. The 'Maintenance Charge' is defined in the lease as the proportion payable by the leaseholder of the sums expended by the Management Company in accordance with the Fifth and Sixth Schedules (those Schedules deal with expenditure ((and payment of that expenditure by the leaseholder)) in maintaining and repairing the building as a whole and the common external areas).

16. On the Land Registry entries for the Property, the Applicant's address is given as the Property address.

The Applicant's case

17. In his application to the tribunal, the Applicant simply contends that the terms of his lease do not entitle the Respondent to recover the charges in question.

18. In his Statement of Case, the Applicant goes further and argues that, even if the charges are payable under the terms of his lease, they have not been reasonably incurred as the rent demands were not sent to the correct address. It does not appear that the Applicant is seeking to challenge the reasonableness of the amount of the Administration Charges themselves.

The Respondent's case

19. The Respondent's case is not entirely clear.

20. The Respondent says that on 30 January 2015 its agents, Eyre and Johnson Limited sent out ground rent demands to the Applicant at the Property. The Respondent says that it was not notified of an alternative address for the Applicant.

21. In its Statement of Case, the Respondent sets out the clauses in the lease upon which it relies, those clauses include paragraphs 11 and 13 of the Third Schedule quoted above. The Statement of Case continues as follows:-

> 4. As the ground rent is over £350.00,the Respondent is relying upon the Lease in that the Applicant has breached the terms of the Lease by not paying the ground rent and the Respondent is requesting the right to forfeit........No section 146 Notice under the Law of Property Act 1925 is required to be served on the Applicant.....as the sums due are for ground rent.

> 8. Late payment fees and administration charges are payable under the Lease and s158 Commonhold and Leasehold Reform Act Schedule 11(c) in respect of a failure by the Applicant to make a payment by the due date to the Respondent.........The Respondent will also argue that these charges arise out of the relationship of landlord and tenant.
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> 12. As a result, the Respondent believes that the Applicant is liable to pay ground rent, interest, administration charges and legal costs under the terms of the lease. The administration charges have been incurred due to the Applicant's failure to pay the Ground Rent as demanded in accordance with the lease.
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> 13. Legal costs have also been incurred due to the Applicant's continued failure to pay the Ground Rent, or advise either E&J or the Respondent of his correspondence address. Legal costs have been incurred "in contemplation of proceedings under Sections 146 and 147" and are therefore payable by the Applicant.

22. In a letter dated 8 September 2015 the Applicant's solicitors state that legal and administration charges are not payable and ask the Respondent's solicitors to identify the clause in the Applicant's lease upon which they rely. In a letter sent to the Applicant's solicitors dated 17 September the Respondent's solicitors say;

> Those costs are charged in accordance with a covenant in the Lease (Third Schedule paragraph 11); To pay all reasonable expenses including solicitors' costs and surveyors fees property incurred by the Company or the Management Company incidental to the preparation and service of a notice under Section 146 Law of Property Act 1925........
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> We are acting with a view to serving a Section 146 notice on behalf of the Company.....should payment not be made.

23. In the light of this confusion, we take the Respondent's case to be as follows:

    (a) In respect of the non-legal Administration Charges, it relies upon paragraph 13 of the Third Schedule to the lease
    (b) In respect of the legal charges, it relies upon paragraph 11 of that Schedule.

Chronology of communications and demands between the parties

24. The relevant chronology is as follows:-

30.01.15	Demands for ground rent of £250 for 2015 and 2014
17.06.15	Letter from E & J Estates demanding ground rent and interest states; "*The amount of £506.90 in connection with the above property is still outstanding. Payment is now overdue and urgently required.*"
07.07.15	A further letter in the above terms
17.07.15	A further letter in the above terms
28.07.15	A further letter which states; "*We write to advise you that as payment has still not been received your*

	account has now been referred to the Landlord's Solicitor, SLC Solicitors, for collection."
31.07.15	A letter from SLC Solicitors which states; "....*We have therefore been instructed to recover these amounts from you......Our client is prepared to issue court proceedings against you to recover the arrears currently outstanding should payment not be received. Those court proceedings will take the form of a monetary claim against you however, you should be aware that forfeiture proceedings are also possible. Forfeiture proceedings may lead to eviction. A landlord may seek forfeiture of a lease if there is a failure to pay a service charge and the tenant has agreed or admitted the amount or it has been determined by a court or tribunal................................ If legal proceedings are commenced we will seek recovery of the arrears including interest, the court fees and disbursements and our client's legal costs. Enforcement of the court's order by our client may result in bailiff attendance at your address and/or forfeiture of the Lease (eviction)......."*
07.08.15	A further letter is sent by SLC. The relevant parts of that letter state; "*Unless you pay £936.63 on or before 2pm on 14 August 2015, we are instructed to commence legal proceedings against you in the County Court.........Legal costs and interest have increased and will continue to increase in the event we have to contact you further and if further action is contemplated or the issue of legal proceedings is necessary.. .Enforcement of the court's order by our client may result in bailiff attendance at your address and/or forfeiture of the Lease (eviction)."*
13.08.15	In an email to the managing agents and Respondent's solicitors, the Applicant says; "*To repeat my offer, if you supply me with a correctly addressed invoice for the ground rent that should have been paid, I will pay immediately."*
14.8.15	In an email to the Applicant the Respondent's solicitors say; "*.....we have been provided with a copy of the Land Registry for flat 9 Ravenscraig House.........As you will see, the correspondence address registered on Land Registry by your Solicitors on purchase of the above property, was also your property address. In the light of this, please provide copies of the correspondence sent by your Solicitors to Eyre and Johnson on the purchase of the property, alerting them to the fact that it was a Buy to Let property, and that your correspondence address was not the property address. On receiving this, we will be able to forward the correspondence to*

	Eyre and Johnson in order for them to review your file. We will place your file on hold for one week...."
14.08.15	A letter from the Applicant's solicitors to the Respondent's solicitors states; "*We are requesting our old file from the archives to investigate this matter. However the file will take approximately two weeks to arrive. Would you please therefore confirm that you will accept rent directly from Mr Jackson at this stage whilst we investigate the matter.*"
08.09.15	A further letter from the Applicant's solicitors to the Respondent's solicitors states; "*Again, we reiterate that our client is prepared to discharge the outstanding rent and the interest in respect of the same in full. We note however, that you are also seeking legal and admin costs which your client is not entitled to recover.......We look forward to hearing from you in the next 7 days with confirmation that your client will now accept payment of the ground rent and interest. If however, we do not hear from you, we will be making an application to the First Tier Tribunal for determination of reasonableness.*
17.09.15	A letter from SLC solicitors to the Applicant's solicitors states; "*The costs are charged in accordance with a covenant in the Lease (Third Schedule paragraph 11);......................* *We are acting with a view to serving a Section 146 notice on behalf of the Company........should payment not be made*"

The law

25. Section 146 of the Law of Property Act 1925 provides that a right of re-entry or forfeiture shall not be enforceable until the landlord serves a notice on the tenant. However, this section does not apply to forfeiture in the case of non-payment of rent.

26. Section 81 of the Housing Act 1996 restricts the forfeiture of leases but it only applies in respect of forfeiture in respect of non-payment of Service or Administration Charges. Before a notice under section 146 Law of Property Act can be served, a tenant must admit the charge or the landlord must obtain a determination that the charge is payable.

27. Section 166 of the Commonhold and Leasehold Reform Act 2002 states that a tenant is only liable to pay ground rent if the landlord has given him a notice relating to the payment. The section goes on to provide as to service of the notice as follows:-

    (6) If the notice is sent by post, it must be addressed to a 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)

28. Section 167 of the Commonhold and Leasehold Reform Act 2002 restricts the right to forfeit for small sums. The current limit of that sum is £350. As the arrears of rent in this case amount to £500, that restriction is not relevant.

29. We have had regard to the decision of the Deputy President of the Upper Tribunal in the case of *Barrett v Robinson*[1]. The relevant lease clause in that case was as follows:-

> 4(14) To pay all reasonable costs charges and expenses (including solicitors' costs and surveyors' fees) incurred by the Lessor in or in contemplation[our emphasis] 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.

30. The Deputy President gave the following guidance regarding the circumstances in which costs could be claimed as Administration Charges under that clause.

> 51. For costs to be recoverable under clause 4(14) a landlord must show that they were incurred in or in contemplation of proceedings, or the preparation of a notice, under section 146. Sometimes it will be obvious that such expense has been incurred, as when proceedings claiming that the forfeiture of a lease are commenced, or a notice under section 146 is served. In other circumstances it will be less obvious.......
>
> 52. Costs will only be incurred in contemplation of proceedings, or the service of a notice under section 146 if, at the time of 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......... nothing in the respondent's own statement submitted to the first LVT suggested that she had any intention of forfeiting the lease, none of the correspondence from her solicitors suggested that such a course of action was in her mind......
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> 57. Clauses such as clause 4(14) are regularly resorted to for the recovery of costs incurred in proceedings before the First-tier Tribunal where that tribunal has made no order of its own for the payment of such costs............. Where a First-tier Tribunal has to determine whether such costs are recoverable as an administration charge it is important that it consider carefully whether the costs come within the language of the particular clause.

Our conclusions

The 'non-legal' Administration Charges

31. These charges appear to be the sums of £49.20 and £99.60 referred to above.

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[1] [2014] UKUT 0322 (LC)

32. We consider that these charges are potentially recoverable pursuant to paragraph 13 of the Third Schedule to the lease because these are costs that, according to the Respondent, that it has been put to and which have arisen out of a non-performance of the Applicant's covenants in the lease.

33. An Administration Charge is defined in Schedule 11 to the Commonhold and Leasehold Reform Act 2002 as; "*an amount payable by a tenant as part of or in addition to the rent which is payable directly or indirectly – in respect of a failure by the tenant to make a payment by the due date to the landlord............or in connection with a breach (or alleged breach) of a covenant or condition in the lease*".

34. These costs appear therefore to be an Administration Charge as defined in the 2002 Act.

35. The next question therefore is, were these charges 'reasonable in amount' as per paragraph 3 of Schedule 11 to the lease? (this is a different question to the one in respect of Service Charges set out in section 19(1)(a) Landlord and Tenant Act 1985 which is whether charges were 'reasonably incurred').

36. As noted above, there does not appear to be any challenge to the reasonableness of the amount of the charges; the challenge is that they were not reasonably incurred.

37. This takes us back to the demand for the ground rent. The only dispute about the demand is whether it was sent to the correct address. The correct address is the address of the subject property unless the Applicant had given to the Respondent written notification of an alternative address for that notice to be given to him.

38. There is no evidence that the Applicant gave written notification of an alternative address for this purpose. The address in the lease of 13 Waratah Drive is clearly not such notification (and of course the address for the Applicant in the Land Registry Entries is of course the address of the subject property).

39. Accordingly therefore we conclude that the rent demand was properly given to the Applicant.

40. It follows therefore that costs incurred by the Respondent in chasing the rent arrears were properly incurred. That could potentially open up the question of the amount of those charges. However, the point has not been raised by the Applicant; he is legally represented and we do not therefore consider that it is for us to raise the issue ourselves. Those costs are therefore payable by the Applicant.

The legal costs

41. The forfeiture clause in question in this application is materially different from that considered in *Barrett*. Crucially, in our view, the clause in this application does not include the word *'contemplation'*.

42. In this case, in order for legal costs to be payable by a leaseholder pursuant to clause 11 of the Third Schedule, those expenses must be incurred incidentally to the preparation and service of a notice under section 146 of the Law of Property Act.

43. The correspondence quoted from above from the Respondent's agents and solicitors makes it clear thatit was incurring expense in pursuing, first the arrears of rent, then the interest on that rent and then the costs of pursuing that rent and interest. The correspondence goes on to mention the possibility of forfeiture as a statement of fact, nothing else. At this stage, matters are a long way from the service of a notice pursuant to section 146. The only reference to the actual serving of a section 146 notice comes in the Respondent's solicitor's letter of 17 September 2015, after the Administration Charges in question have been incurred.

44. There is however one further crucial point to be made. It is clear from the statutory provisions referred to earlier in this decision that there was no requirement in any event for a notice to be served pursuant to section 146. That section does not applyto arrears of rent. Section 167 of the Commonhold and Leasehold Reform Act 2002 did not apply as the rent arrears were in excess of £350. Therefore the Respondent could have proceeded straight to forfeiture without the service of any notice. It did not.At the material times when the Administration Charges were being incurred, it chose to consider and threaten a debt action in the County Court.

45. In these circumstances therefore, clause 11 of the Third Schedule was never brought into play, there was never any question of the preparation or service of any notice under the Law of Property Act. The only other way in which clause 11 could be brought into play is if the Respondent was seeking the recovery of arrears of Maintenance Charge. Clearly the arrears being sought were not Maintenance Charge, they were rent arrears.

Costs and fees

Section 20C Landlord and Tenant Act 1985

46. The Applicant sought an order preventing the Respondent from placing any of the costs incurred in these proceedings on the Service Charge.

47. The Applicant has been partly successful in this application. The Respondent argued that no order should be made pursuant to section 20C because the Respondent has been put to the expense of pursuing rent arrears. In the circumstances we order that, of the costs incurred, or

to be incurred, by the Respondent in connection with this application, half of those costs are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant.

Fees

48. The Applicant has requested an order that the Respondent reimburse to him the fee that he has paid in order to make this application.

49. The first question here is whether the application was premature in the light of the correspondence between the parties. We do not think it was. The Applicant set out his position clearly himself and this was then reiterated by his solicitors who made it clear that they would make this application on the Applicant's behalf. There was no timely response to the treat of this application and in any event the response was, as we have found, partly incorrect. Accordingly the application was properly made.

50. However, the Applicant was only partly successful; in the circumstances, we order the Respondent to pay to the Applicant half of his application fee (£32.50) within 28 days of the date of this decision.

Mark Martynski, Tribunal Judge
7 December 2015

ANNEX - RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.