FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Property	**:** 11 Wolsey Grove, Esher, Surrey KT10 8NU
Case Reference	**:** CHI/43UB/LAC/2018/0011
Applicant	**:** Marzena Grzelakowska
Representative	: None
Respondent	**:** Aycliffe Technology Limited
Representative	: Jon Watt (director)
Type of case	**:** Payability of administration charges and restricting of litigation costs under Paragraphs 5 & 5A of Schedule 11 to the Commonhold & Leasehold Reform Act 2002
Tribunal Member	**:** Judge A Johns QC
Date of Decision	**:** 30 November 2018

PAPER DETERMINATION

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1. Aycliffe Technology Limited ("the Landlord") has sought payment from Marzena Grzelakowska ("the Tenant") of charges totalling £600 relying on the following tenant's covenant in her lease of 11 Wolsey Grove, Esher, Surrey KT10 8NU ("the Flat"):

"*To pay all costs charges and expenses (including solicitor's costs and surveyor's fees) incurred by the landlord for the purpose of or incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 or any similar enactment from time to time replacing such section notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court*".

2. These charges are disputed by the Tenant and she makes this application under Paragraph 5 of Schedule 11 to the Commonhold & Leasehold Reform Act 2002 asking the Tribunal to determine their payability.

Factual background

3. The Tenant is the current lessee of the Flat under the lease dated 21st September 1978 ("the Lease"). The Lease is for a term of 125 years from 25th March 1978 at an annual ground rent of, for the second 25 years, £50 payable in advance in 2 instalments on 25 March and 29 September. The Lease also reserves as additional rent a sum equal to one quarter of the amount spent by the Landlord in insuring the building of which the Flat forms part.

4. The Lease contains a forfeiture clause, being clause 5, and clause 2(e) is a covenant for the payment by the tenant of costs in the form quoted at paragraph 1 above.

5. The Tenant was late in paying ground rent and insurance rent treated as falling due on or around 25 March 2016 and 25 March 2017.

6. Mr Jon Watt, a director of the Landlord, was in the habit of sending out annual demands a little after the March quarter day demanding insurance rent as well as ground rent in an annual sum; being content to receive the ground rent instalment for the period from 29 September of the previous year in arrears. His demands in respect of the March 2016 and 2017 quarter days in a total sum of £759.84 were settled by way of 2 payments made by the Tenant on about 2 May 2017 and 19 March 2018. The Tribunal observes that, on the face of it, there appears to have been overpayment of rent. The demands refer to an annual ground rent of £60 whereas the rent reserved by the Lease is currently an annual sum of £50.

7. Some efforts having been made by Mr Watt to chase payment, including seeking payment from the Tenant's mortgagee, Mr Watt then made the following demand by email of 1 April 2018:

"*Unfortunately as you're aware I have expended time and effort in managing your account for which I will need reimbursing …*

1. 1 hr of solicitor time - £250 + VAT

2. My time costed at £100/hr – 2 hrs correspondence, 1hr misc. including visits to Gascoigne-Pees = £300

Outstanding amount £600 total."

Gascoigne-Pees were estate agents visited by Mr Watt seeking an address for the Tenant.

<u>Grounds of challenge</u>

8. The following grounds of challenge to the payability of the charges can be collected from the application and subsequent statements of case:

8.1 They are not payable under the terms of the Lease.

8.2 No summary of rights and obligations was sent with the demand for the charges.

8.3 The charges are unreasonable.

9. The Landlord's response to the application has been by way of highlighting late payment of rent by the Tenant and explaining the resulting work done by him for the Landlord.

<u>Law</u>

10. By paragraph 5 of Schedule 11 to the 2002 Act, the Tribunal has jurisdiction to determine the payability of an "administration charge".

11. An administration charge as defined by paragraph 1 of Schedule 11 includes "*an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly … (c) in respect of a failure by the tenant to make a payment by the due date to the landlord …, or (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.*".

12. A "*'variable administration charge' means an administration charge payable by a tenant which is neither (a) specified in his lease, nor (b) calculated in accordance with a formula specified in his lease*" – paragraph 1 of Schedule 11. Such a charge is, by virtue of paragraph 2 of Schedule 11, payable only to the extent that it is reasonable.

13. As reflected in the decision of the Upper Tribunal (Lands Chamber) in *Barrett v Robinson* [2014] UKUT 322 (LC) charges made under covenants of the sort relied on in this case are variable administration charges.

14. It is also plain from *Barrett v Robinson* that a distinction is to be drawn between covenants concerned only with costs associated with forfeiture and those which are more general indemnity covenants.

15. Here, the covenant is concerned solely with costs "*incurred by the landlord for the purpose of or incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925"*. Accordingly, the following statement of Martin Rodger QC in *Barrett v Robinson* (at para.52) is applicable to the covenant in this case: "*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 cl.4(14) as providing a contractual right to recover its costs.*"

16. As to the importance of a statement of rights and obligations, subparagraph 4(1) of Schedule 11 provides that "*A demand for the payment of an administration charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to administration charges*". A failure to comply with such requirement means that the charge is not payable; subparagraph (2) providing that "*A tenant may withhold payment of an administration charge which has been demanded from him if subparagraph (1) is not complied with in relation to the demand*".

<u>Decision</u>

17. Starting with the first ground of challenge, the question is whether the charges raised are payable given the terms of the covenant at clause 2(e) of the Lease set out in full at paragraph 1 above.

18. On the papers before the Tribunal, the charges are not within the scope of the covenant and so are not recoverable.

19. There is no evidence at all to suggest that the work of Mr Watt or his solicitor was done with a view to forfeiture. On the contrary, there is no mention at all of forfeiture in Mr Watt's correspondence, his statements of case to the Tribunal or the invoice from his solicitor describing the work said to have been carried out. Rather, all efforts seem to have been directed at chasing payment. But chasing payment is not a step taken for the purposes of or incidental to the preparation and service of a s.146 notice. It is not an act done with a view to forfeiture.

20. There is a further reason why the sum of £300 charged in respect of Mr Watt's time is not within the scope of the covenant. The covenant requires payment of costs "*incurred*". And there is no evidence that the Landlord incurred a cost of £300 by way of payment to Mr Watt.

21. There must also be significant doubt as to whether the sum of £250 plus VAT charged in respect of the solicitor was in fact incurred by the Landlord. In that respect there are the following oddities:

21.1 The invoice from the solicitor, Mr A Adoki, is not a VAT invoice and yet Mr Watt sought for the Landlord payment of £250 plus VAT.

21.2 The invoice has the following remarkable title: "Professional Fee's of Mr A.Adok1". The solicitor appears to have spelled his own name incorrectly on an apparently standard invoice by using a digit, and described his charges as "Fee's".

21.3 Whereas the invoice is for "*time spent 1 hour*", Mr Watt's statement to the Tribunal dated 21 July 2018 gives, as part of a detailed breakdown of the costs sought, the time spent as 45 minutes.

21.4 It is, in any event, difficult to see how 1 hour could be spent discussing non-payment of 2 demands for ground and insurance rent totalling £759.84.

22. However, it would not be right to find on a paper determination that this cost was not in fact incurred. Had this issue been determinative of the case, there would need to be a hearing.

23. Turning to the second ground of challenge, there is no suggestion in the papers before the Tribunal that a summary of rights and obligations as required by paragraph 4 of Schedule 11 to the 2002 Act was sent with the demand for the charges of £600. The consequence is that, even if they had fallen within the scope of the covenant, they would not be payable.

24. As to the third ground of challenge, namely reasonableness or otherwise of the charges, it is not necessary given the conclusions above, and would be highly artificial, to attempt a decision on that question. Questions of reasonableness are fact sensitive. Here, where the costs were not incurred for the purposes stated in the covenant and were not, at least in part and perhaps in whole, incurred at all, it is not the right course to embark upon a determination of whether, had they been, they would have been reasonable.

Costs and fees in the Tribunal

25. The Tenant's application extends to asking for an order reducing or extinguishing any liability she may have under the Lease to pay the costs of these proceedings. The Tribunal may make such an order under paragraph 5A of Schedule 11 to the 2002 Act.

26. It is just and equitable to make such an order in this case. The Tenant has been entirely successful. She should not have to bear, under the Lease or otherwise, the Landlord's costs of resisting her challenge to its charges.

27. It is also right that, having been successful, she should have an order under rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 for the Landlord to reimburse her fee for this application to the Tribunal. That fee was £100.

Summary

28. From the above, the Tribunal:

28.1 Determines that the charges of £600 made by the Landlord relying on clause 2(e) of the Lease are not payable.

28.2 Orders that any liability of the Tenant under the Lease for the costs of these proceedings is extinguished.

28.3 Orders that the Landlord must reimburse the Tenant the sum of £100, being her fee for this application to the Tribunal

Judge A Johns QC

30 November 2018

Appeal

(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.