



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case References : BIR/00CS/LAC/2014/0027 & 0027c

Property : 48 Glaslyn Ave, Rowley Regis, B65 8EG

Applicant : Kevin Ronald Spencer

Representative : None

Respondents : Adriatic Land 1 (GR1) Ltd (1)
Holding & Management (Solitaire) No 2 Ltd (2)

Representatives : First Port Property Services Ltd (for Respondent 2)

Type of Application : Application for determination of liability and reasonableness of administration charges under schedule 11 of the Commonhold and Leasehold Reform Act 2002

Tribunal Members : Judge C Goodall LLB
Mr N Wint BSC (HONS), ACI Arb, FRICS

Date and venue of Hearing : Paper determination

Date of Decision : 23 FEB 2016

DECISION

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Background

1. Mr Spencer ("the Applicant") owns the leasehold property at 48 Glaslyn Ave, Rowley Regis, B65 8EG ("the Property"). The Property is a leasehold flat. It is part of a building on an estate containing a number of other flats, each of which contributes towards the costs of maintaining the estate (the number of flats and the proportions payable are not in issue in this case).
2. The freeholders are Adriatic Land 1 (GR1) Ltd and the managers appointed in the lease are Holding & Management (Solitaire) No 2 Ltd ("the Second Respondent"). The managers have appointed First Port Property Services Ltd ("First Port") as their agents in connection with provision of services and collection of the service charge.

The Application

3. This application was made on 30 October 2015, and is for a determination of the payability of administration charges levied by First Port as agents for the Second Respondent. Two administration charges have been levied, each for £60, on 8 September 2015 and on 25 September 2015. In addition, the Applicant has been notified in a letter dated 1 October 2015 from the solicitors acting for First Port that he has incurred legal charges of £246.00.
4. The application was considered, with the consent of the parties, on the basis of written representations and without a hearing or inspection. The Tribunal considered the application form and the documents sent with it, the Respondents' statement of case and attached documents received on 30 December 2015, and the Applicant's further response dated 5 January 2016.

The Law

5. The Tribunal's jurisdiction to consider an administration charge is derived from Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ("the Act"), the relevant parts of which provide as follows:
 - 1 (1) 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) for or in connection with the grant of approvals under his lease, or applications for such approvals,
 - (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

...

(3) In this Part of this Schedule "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.

...

2 A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

...

4 (1) 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.

(2) The appropriate national authority may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.

(3) A tenant may withhold payment of an administration charge which has been demanded from him if sub-paragraph (1) is not complied with in relation to the demand.

(4) Where a tenant withholds an administration charge under this paragraph, any provisions of the lease relating to non-payment or late payment of administration charges do not have effect in relation to the period for which he so withholds it.

5 (1) An application may be made to an appropriate tribunal 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, and

- (e) the manner in which it is payable.
- (2) Sub-paragraph (1) applies whether or not any payment has been made.
- (3) The jurisdiction conferred on an appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

...

- 6 (6) "Appropriate tribunal" means –
 - (a) in relation to premises in England, the First-Tier Tribunal...

The Lease

- 6. The Applicant is the original lessee of a lease dated 29 September 2006 under which the Property is leased to the Applicant for a term of 125 years from 1 January 2005 at an initial ground rent of £150 per year for the first 25 years, payable half yearly on 1 April and 1 October in each year to the Second Respondent.
- 7. The Second Respondent covenants in the lease to provide certain services in return for which the Applicant covenants to pay a service charge in advance on 1 April and 1 October in each year. If the service charge account is overspent, a maintenance adjustment is payable following a process set out in the Fourth Schedule. The detail is not relevant to this case.
- 8. The Third Schedule of the Lease (on which First Port rely) contains a covenant by the Applicant:

"To pay to [the Second Respondent] on a full indemnity basis all costs and expenses incurred by [the Second Respondent] or [the Second Respondent's Solicitors] in enforcing the payment by the Lessee of any Rents Service Charge Maintenance Adjustment ... or other monies payable by the Lessee under the terms of this Lease."

History

- 9. The service charge year for the Property runs from 1 April to 30 March. Doing the best it can with the figures supplied to it, the Tribunal has endeavoured to reconstruct the history of liabilities and receipts on the Applicants account from the 2013/14 service charge year to the current date. The Tribunal has ignored historical administration charges which have subsequently been re-credited, and claims for ground rent as no ground rent charges or payment are shown on the Applicant's statement for the period under consideration. This shows:

Date	Description	Charge	Receipt	Balance
2013/14	Opening balance			117.61
1 Apr 2013	First half yearly service charge for 13/14	438.13		555.74
7 May 2013	Payment		438.13	117.61
9 Sept 2013	Service charge adjustment for 12/13	44.91		162.52
1 Oct 2013	Second half yearly service charge for 13/14	438.13		600.65
15 Oct 2013	Payment		555.74	44.91
17 Oct 2013	Service charge adj. for decorating	160.33		205.24
26 March 2014	Payment		453.09	247.85cr
1 April 2014	First half yearly service charge for 14/15	453.09		205.24
29 Sept 2014	Service charge adjustment for 13/14		68.06	137.18
1 Oct 2014	Second half yearly service charge for 14/15	453.09		590.27
10 Dec 2014	Further service charge adjustment		25.60	564.67
undated ¹	Further service charge adjustment		118.04	446.63
1 April 2015	First half yearly service charge for 15/16	484.26		930.89
9 April 2015	Payment		484.26	446.63
8 Sept 2015	Administration charge	60.00		506.63
24 Sept 2015	Payment		484.26	22.37
25 Sept 2015	Administration charge – legal fee review	60.00		82.37
1 Oct 2015	Second half yearly service charge for 15/16	484.26		566.63

10. This balance due of £566.63 is accepted by First Port as the true balance on the service charge account in their statement to the Tribunal in December 2015 (page 1 and 4 of the First Port statement). In addition, they say that the Applicant owes £75 in ground rent and £246.00 which is a solicitor's fee incurred but which has not yet been charged to the service charge account.

¹ This credit is taken from the Respondents statement at page 4 and is the "balancing charge for 2015". It is not shown on any of the printed statements of account sent to the Applicant which have been provided to the tribunal.

11. Previous correspondence sent to the Applicant alleged that the outstanding balance due had been a variety of sums, as follows:
 - a. On 8 September 2015, First Port wrote to the Applicant to say they had added £60 to his account which made the balance outstanding £624.67
 - b. On 13 September 2015, First Port sent an invoice to the Applicant for the administration charge of £60 added on that date and gave the outstanding balance as £1,108.93
 - c. On 25 September 2015, First Port wrote to the Applicant to inform him they were referring his account to solicitors and his balance outstanding was £684.67
 - d. On 1 October 2015, First Port gave the outstanding balance figure as £1,048.93.
 - e. Also on 1 October 2015, JB Leitch, solicitors, wrote to the Applicant to say his outstanding balance was £1,318.93. That letter also gave notice to the Applicant that he was obliged to pay their costs under the lease, which, to date, were £246.00. The letter said "we assert that these costs are reasonable based upon the costs information attached". That costs information has not been supplied to the Tribunal. The letter required full payment of the sum of £1,564.93.
 - f. On 13 October 2015, JB Leitch wrote to the Applicant to acknowledge receipt of two cheques from the Applicant for respectively £484.26 and £75, and said that upon clearance of those cheques the outstanding balance due would be £1,005.67. The outstanding balance shown on the statement of account sent with that letter said the outstanding balance was £1,168.93.
12. None of the alleged outstanding balances shown above in paragraph 11 appear to be reconcilable with the reconstructed statement of account the Tribunal has prepared in paragraph 9 above.
13. The true service charge balance of £566.63 as at 1 October 2015 is made up of three elements, being:
 - a. The sum of £453.09 which was the second service charge on account levied on 1 October 2014 for the 2014/15 year. It is common ground between the parties that this sum has not been paid.
 - b. The two disputed administration charges of £60 each which were charged in September 2015.
 - c. A credit of £6.46 due to the Applicant as a result of the service charge adjustments arising in 2013/14, 2014/15 and 2015/16. The account at paragraph 9 above shows debits of £44.91 and £160.33

and credits of £68.06, £25.60 and £118.04 and the credit due of £6.46 is the netting off of these sums.

14. It now becomes necessary to understand why the 2014/15 service charge of £453.09 is unpaid. The Applicant explains it in this way. He says he sent a cheque for the exact sum due of £453.09 ("the Cheque") to First Port on 7 September 2014, i.e. before it was legally due to be paid. It was cheque number 000068 on his Lloyds TSB account. There is no doubt that it was sent and received and no doubt that it has never been cashed. The Applicant says First Port never presented it to their bank. First Port say they did present it to their bank but that it was returned marked "account switched" and "not signed in accordance with the mandate". They have provided a copy of the Cheque which confirms this and the Tribunal notes that the cheque is also marked "do not represent this cheque". The Cheque is drawn on an account with Lloyds TSB.
15. On 30 March 2015, the Applicant wrote to First Port. He said in that letter that he had spoken to a Mr Nigel Hampton about the failure to cash the Cheque before Christmas in 2014 and had been promised that an investigation would be carried out and that he would be contacted again, but he says he never was. He says he asked that the Cheque be returned to him uncashed and he would send a replacement cheque by return of post. This was part of his conversation with Mr Hampton and he repeated that request in his letter of 30 March 2015 and in a further letter he wrote to First Port on 24 September 2015.
16. In his submission to the Tribunal in January 2016, the Applicant gave more background information. He provided a letter from Lloyds Bank dated 4 January 2016 confirming that the bank had no record of the Cheque being presented for payment. He also explains the reference on the Cheque to "account switched". He says Lloyds TSB split into two separate banks in about 2014. He was allocated to TSB, but he says this was inconvenient for him and he therefore opened a new account with Lloyds on 14 May 2014. He was advised that he could continue to use his old Lloyds TSB cheque book as all "payments sent to or requested from your old account will be redirected to your new account for 36 months after your switch". He says this actually happened with cheques issued around the same time as the Cheque.
17. The Applicant also says he does not understand why the bank have stated the Cheque was not signed in accordance with the mandate. He says another cheque written within minutes of this cheque for ground rent due for the Property was cashed by the bank.
18. In relation to the additional service charge adjustments said to be due for 2013/14 and 2014/15 in the sums of £44.91 and £160.33 the Applicant says he never received a demand for the former sum, and he sent First Port a cheque for the latter amount which they have never cashed. Both sums

have of course now been received by First Port through the maintenance adjustment credits (see paragraph 13(c) above).

Deliberations

19. The Tribunal has to decide whether the two charges of £60 each levied in September 2015 are administration charges, and if so whether they are reasonable. There is no difficulty over the first issue. These are charges which are alleged to be for failure by the tenant to make a payment that is due under the Lease. The charges are also variable as the charges are neither specified in, nor calculated in accordance with a formula contained in, the Lease.
20. Are the charges reasonable? In the view of the Tribunal they are not. First Port did not provide any rationale for imposing them. The Tribunal cannot see any reason for them to be imposed.
21. It is clear that, when the charges were imposed, the Applicant's service charge account was in arrears in the sum of £446.63 (see paragraph 9 above). This sum represented the unpaid charge of £453.09 less the credits on the account as a result of maintenance adjustments. First Port were at that point holding the Applicant's cheque for £453.09. It had been presented but not paid. Their bank must have informed First Port that the cheque could not be re-presented as the Applicant's account had been switched. First Port appear never to have written to the Applicant to provide the detail of this explanation and appear not to have shown the Applicant a copy of the returned cheque until production of their statement in this case in December 2015. The Applicant had informed them on three occasions that if they would return the cheque, he would issue another straight away to bring the account up to date, but there is no record shown to the Tribunal of any response to this offer.
22. The Tribunal's view is that the Applicant's position was entirely reasonable and understandable. He had been a Lloyds TSB account holder and the new bank he had been compulsorily allocated to had been inconvenient, so he had opened a new account. But he had been informed that cheques written on his old account could still be presented, and he reasonably therefore refused to write a new cheque until the old one had been returned. He was not to know, and did not know, that the Cheque had been marked "do not represent this cheque".
23. Rather than arbitrarily sending two new bills, the reasonable and obvious course of action for First Port should have been to take the Applicant up on his offer to replace the cheque forthwith. As managers, (for which a management fee is likely to have been charged), one of First Port's responsibilities is to deal with the administration of receipts and payments relating to the service charge. This was an administrative problem that should have been resolved by First Port within their management charge.

24. The Tribunal determines that the administration charges levied upon the Applicant dated 13 September 2015 (invoice number 706516) and 25 September 2015 (invoice number 708985) are not reasonable and are therefore not payable by the Applicant.
25. First Port have indicated they intend to add a further £246 to the Applicant's account in respect of the charges of J B Leitch. It is stated that these charges have not yet been added to the Applicant's account.
26. The Tribunal considers that the reference to the failure so far to add these legal charges to the Applicant's account yet is irrelevant. The Second Respondent's solicitors have written a formal letter demanding these charges, and it is unfair to expect the Applicant to assume anything other than that those solicitors consider they are legally entitled to this payment.
27. The Tribunal finds that they are not entitled to charge this sum, or anything at all, for making demands upon the Applicant in respect of any existing arrears on the account as at the date the demand was made. As the Tribunal has found that First Port have acted unreasonably in treating the outstanding sum of £446.63 as if it was arrears that the Applicant was refusing to pay, it follows that any further sum applied to the account for trying to enforce this sum is unreasonable. This solicitors charge is unreasonable and not payable.
28. The Tribunal will also comment on the ground rent position. As has been identified above, ground rent is payable to the Second Respondent, but is not shown on the Applicant's service charge account, or at least it has not been so since 1 April 2012. However, in the papers supplied to the Tribunal by the Applicant, there is a statement from the First Respondent showing a charge for ground rent due on 1 October 2015 of £75 (which is due and payable), but the statement also includes a second charge of £75 for "breach of Lease Fee". Nothing that the Tribunal has considered from either party gives the Tribunal any further detail about this second charge, and nothing in this decision should be taken as determining whether it is or is not due or payable.
29. The final comment the Tribunal makes on the substance of this case is that the bank's markings on the Cheque make it clear that it will now not be met by the Applicant's bank even if represented. The Applicant should therefore now make payment of the undisputed balance of £446.63.

Section 20C

30. The Applicant has made an application for an order under section 20C of the Act that none of the costs incurred by the Respondents (which includes their agents) should be recoverable under the service charge provisions of the Lease. Except in very limited circumstances, the Tribunal has no power to award costs against a party to proceedings before it. None of those limited circumstances apply to this application, so there is no direct costs order made by the Tribunal. The purpose of section 20C is to give the

Tribunal the power to prevent a Respondent actually recovering its costs via the service charge when it was not able to recover them by a direct order from the Tribunal.

31. The discretion given to the Tribunal is to make such order as it considers just and equitable.
32. The Tribunal finds that it would not be equitable for the Applicant to have to bear any of the costs of this case through the service charge, as the Tribunal has ruled clearly in favour of the Applicant.
33. The Tribunal therefore makes an order under section 20C of the Act that none of the costs of this case are to be regarded as relevant costs to taken into account in determining the amount of any service charge payable by the Applicant.

Application fee

34. The Tribunal has power, acting on its own initiative, to order that any party must reimburse the whole or any part of any fee paid by the other party. In this case, the Applicant paid a fee of £125.00. As the Tribunal has considered that the Second Respondent, through the actions of its agent First Port, have acted unreasonably in imposing charges leaving the Applicant with no alternative but to bring this case to the Tribunal, it would be unjust, in the Tribunal's, view, for the Applicant to be out of pocket. The Tribunal therefore orders that the Second Respondent must reimburse the Applicant in the sum of £125.00.

Summary

35. The Tribunal determines:
 - a. that the administration charges levied upon the Applicant dated 13 September 2015 (invoice number 706516) and 25 September 2015 (invoice number 708985) and any charges that are claimed to indemnify the Second Respondent for any solicitor's costs for enforcement action against the Applicant in this case are not reasonable and are therefore not payable by the Applicant;
 - b. that none of the costs of this case are to be regarded as relevant costs to taken into account in determining the amount of any service charge payable by the Applicant; and
 - c. that the Second Respondent must reimburse the Applicant his application fee in the sum of £125.00.

Appeal

36. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing

must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)

23 FEB 2016