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

Case Reference : **LON/00AG/LSC/2012/0654**

Property : **The Mitre, 242 Grafton Road,
London NW5 4AU**

Applicants : **Ms Bonnie Andrews Flat 6
Ms Karen Farquhar Flat 7
Dr Naomi Walker Flat 8
Mr Steven Marshall Flat 9**

Representative : **Ms K Farquhar**

Respondent : **Southern Land Securities Limited**

Representative : **Hamilton King Management
Limited**

Type of Application : **Schedule 11 Commonhold and
Leasehold Reform Act 2002 –
determination of administration
charges payable**

Tribunal Members : **Judge John Hewitt
Mr Trevor Johnson FRICS
Mr Nat Miller BSc**

**Date and venue of
Determination** : **20 September 2013
10 Alfred Place, London WC1E 7LR**

Date of Decision : **30 September 2013**

DECISION

Decisions of the Tribunal

1. The Tribunal determines that:

1.1 The following administration charges are payable by Dr Naomi Walker:

29.09.10	Interest – On account S/c	£ 50.94
02.11.11	Interest – ground rent	£ 4.16
02.11.11	Interest – On account S/c	£ 29.17

1.2 The following administration charge is payable by Mr Steven Marshall:

30.11.12	Interest – ground rent	£ 20.62
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1.3 The following administration charges are not payable by Mr Steven Marshall:

08.06.12	Section 146	£235.00
08.06.12	Section 146 Mortgage Search	£ 42.00
08.06.12	Section 146 Collecting Debt	£ 81.60
08.06.12	HKM Instruct Solicitors Collect B-Soc	£ 90.00
08.06.12	SLS Instruct Solicitors Collect B Soc	£ 65.00
06.08.12	Marsdens Solicitors Fees	£484.00
30.11.12	Interest on Instructing Solicitors	£ 13.26
30.11.12	Interest on Solicitors Fees	£ 10.87
30.11.12	Interest on Hamilton King Fees	£ 12.56
30.11.12	Interest on Miscellaneous Charges	£ 35.29

1.4 The Tribunal does not have jurisdiction to determine the remaining administration charges levied on Mr Marshall and put in issue because they have been the subject of determinations by the court.

2. The reasons for our decisions are set out below.

NB Later reference in this Decision to a number in square brackets ([]) is a reference to the page number of the hearing papers provided to us for use at the hearing.

Procedural background

3. The Applicants brought an application pursuant to section 27A of the Landlord and Tenant Act 1985 and challenged a number of service charges claimed by the Respondent landlord.

4. Our substantive decision on that application is dated 28 March 2013. It sets out the material background and we need not repeat that in this Decision.

5. During the course of the hearing almost passing reference was made to a number of variable administration charges imposed by the Respondent, or more accurately by its managing agents. Many of them

related to legal costs and contractual interest payable in consequence of late paid sums. In the course of the hearing the Respondent's representatives informed the Tribunal that a number of those charges were to be withdrawn. Which entries were not identified and no undertaking was given that all the historic administration charges imposed on the accounts would be reversed.

6. The Applicants succeeded on a number of their challenges to the service charges. In consequence they would be entitled to credit entries on their individual cash accounts with the Respondent. It was to be hoped that the arithmetic would be straightforward and the amount of the credits readily agreed and entered. However, in case there was to be a dispute paragraph 80 of our substantive Decision made provision for an application for directions to enable the Tribunal to settle any dispute.
7. An application was duly made and Directions were given on 3 June 2013 for the exchange of statements of case. The parties were notified that the Tribunal proposed to make its determination on the papers and statements of case and without an oral hearing pursuant to Regulation 13 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 (the 2003 Regulations). The parties were also notified that the Tribunal would endeavour to arrive at its determination during week commencing 11 August 2013 and that they were reminded that at any time before the Tribunal reaches its decision they may make a request to be heard. (In the event and due to diary congestion the reconvene of the Tribunal was delayed).
8. By virtue of the Transfer of Tribunal Functions Order 2013 SI 2013 No.1036 the functions of the Leasehold Valuation Tribunal for areas in England were transferred to the First-tier Tribunal (Property Chamber) with effect on 1 July 2013.

These proceedings are now subject to The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the Rules), save to the extent that the Tribunal may dis-apply all or any of these Rules in favour of the 2003 Regulations.

9. The Tribunal has not received a request from any party to be heard.
10. The Tribunal has received:
 - 10.1 A letter dated 20 June 2013 from Ms Farquhar on behalf of Dr Walker and Mr Marshall together with some copy correspondence written by Franklands Solicitors. This is taken to be the Applicants statement of case;
 - 10.2 An undated document headed 'Respondents Case: The Mitre LON/00AG/LCS/2012/0654 together with a volume of documents page numbered 1-61. This is taken to be the Respondent's statement of case in answer; and
 - 10.3 An undated letter from Ms Farquhar which appears to be a reply to the Respondent's statement of case and to which are attached

copies of certain tender documents and a copy of the lease for Flat 6.

11. These are the documents we have considered as part of our determination.

The lease

12. There does not appear to be any dispute as to the lease terms. Material provisions are as follows:

12.1 In clause 1 – the *reddendum* - a ground rent payable and “(ii) *the additional and further rent payable under the provisions of paragraph 2 of the Fourth Schedule.*”

12.2 In clause 2 a covenant on the part of the tenant to observe and perform the obligations set out in the Fourth and Sixth Schedules.

12.3 In paragraph 2 of the Fourth Schedule the obligation on the part of the tenant to pay, by way of additional rent, by one instalment in advance on 29 September in each year such estimated sum as shall be reasonably required by the landlord or its agents and notified to the tenant being one-ninth of the costs of the landlord of performing the covenants on the part of the landlord – in essence a sum on account of the service charge.

12.4 In paragraph 24 of the Fourth Schedule the obligation to pay to the landlord:

“...all proper and reasonable costs charges and expenses (including all Solicitors and Surveyor’s costs) properly incurred by the Landlord in or in contemplation of any proceedings under Sections 146 and 147 of the Law of Property Act 1925 notwithstanding forfeiture is avoided otherwise than by relief granted by the Court or in connection with the preparation and service of schedules of dilapidations (whether during the term or following the expiry thereof) and the supervision of the works specified therein.”

12.5 In paragraph 31 of the Fourth Schedule the obligation to pay to the landlord interest in the event that any rent or other sum of money payable under the lease and unpaid for 21 days. Such interest to be calculated on a day to day basis at the rate of 2% per annum over the Midland Bank Plc’s base rate compounded on each quarter day.

The charges claimed and in dispute

Dr Walker

13. The three entries on Dr Walker’s account which were originally challenged were:

29.09.10	Interest – On account S/c	£126.31
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02.11.11	Interest – ground rent	£ 4.16
02.11.11	Interest – On account S/c	£ 29.17

The claim in respect of ground rent is now conceded by Dr Walker. In her reply Ms Farquhar states plainly that: “*we do not dispute interest charges made on ground rent.*” Accordingly, we are only concerned with the claims relating to late payment of on account service charges.

With regard to the original claim to £126.31 this was interest on late payment of an on account service charge demand which included a substantial sum in respect of major works proposed to be carried out. In the event those works were not carried out and the Respondent concedes that the original sum on account sought was not reasonable in amount. The Respondent concedes that not the whole of the interest of £126.31 is payable. It has calculated that the interest attributed to the major works element of the on account demand amounted to £75.37 [32] and this sum has been credited to Dr Walker’s account. Thus the net sum now claimed by the Respondent is £50.94. The calculation is at [32] and does not appear to be challenged.

14. The claim to the £29.17 relates to late payment of the sum on account sum of £1,252 demanded for the year commencing 29 September 2010. The calculation of this sum is at [34] and does not appear to be challenged.
15. The gist of the case for Dr Walker is that there was a major works dispute with the landlord and the Applicants’ solicitors requested that all accounts be put on hold until a hearing before the LVT. Ms Farquhar submits that the major works dispute spanned the period May 2010 to March 2013 and “*During these dates we reserved the right to not pay charges including yearly service charges as we all felt we were not getting our monies worth.*”
16. We reject the submissions made on behalf of Dr Walker. We reject the notion that Dr Walker had a right not to pay routine service charges simply because there was an issue about major works and/or monies worth.
17. The lease is very clear there is an obligation to pay on 29 September in each year a share of an estimated sum reasonably required by the landlord to comply with its obligations under the lease. That obligation is not suspended because there might be a dispute with the landlord over other service charge issues or amounts. The estimated share was payable unless the tenant had obtained a determination from an LVT that it was unreasonable in amount, in which case a lesser sum might have been payable. We are reinforced in this conclusion by the decision of His Honour Judge Huskinson in *Wrigley v Landchance Property Management Limited* [2013] UKUT 0376 (LC) in which he reviewed and discussed the continuing obligation on the part of a tenant to make half-yearly payments on account where there was a dispute between landlord and tenant about the provision of audited accounts in prior

years. He held that continuing on account payments were not irrecoverable by reason of subsequent failure on the part of the landlord to procure audited accounts for the year in question. Thus the obligation to continue to pay the on account sums half yearly as they fell due.

18. It is not in dispute that sums on account had been demanded and that they were not paid. It is not in dispute that the lease provides an obligation on the tenant to pay interest on sums unpaid for 21 days. The calculation of the amount of the interest (eventually) claimed was not in dispute.
19. In these circumstances and for these reasons we find that Dr Walker's challenge to the two sums of interest on the unpaid on account service charges fails and thus the sums of £50.94 and £29.17 are payable by her. The sum of £4.16 was not in dispute and thus that is also payable by her.

Mr Marshall

20. In some respects the position of Mr Marshall is more complex.
21. A print out of Mr Marshall's service charge account is at [41-45] Ms Farquhar has circled in red those administration charges which are in challenge. There are many.
22. The Respondent contends that it has obtained two judgments against Mr Marshall and that many of the sums now challenged are included within those judgments.
23. The first judgment was dated 7 May 2010. A copy is at [10]. The Respondent says that the administration charges highlighted in green on [37-38] are included within this judgment. This has not been challenged by Ms Farquhar in the reply filed on behalf of Mr Marshall.
24. The second judgment is dated 25 May 2012. A copy is at [17]. The Respondent says that the administration charges highlighted in blue on [37-38] are included within this judgment. This has not been challenged by Ms Farquhar in the reply filed on behalf of Mr Marshall.
25. Although not stated expressly by the Respondent in its statement of case it is implicit that an issue of jurisdiction is raised.
26. Material provisions of Schedule 11 are set out in the Schedule below at the end of this Decision. It will be seen that paragraph 5(4)(c) of Schedule 11 provides that no application may be made in respect of a matter which has been the subject of determination by a court. There is authority for the proposition that in the context of service charges and administration charges a determination by a court includes the issue by a court of a default judgment. Accordingly we find that we do not have jurisdiction to determine or consider those administration charges highlighted in green and those charges highlighted in blue on [37-38]. It is our

understanding that those sums have now been paid by Mr Marshall (or his mortgagee).

27. That leaves for consideration the following administration charges in issue:

08.06.12	Section 146	£235.00
08.06.12	Section 146 Mortgage Search	£ 42.00
08.06.12	Section 146 Collecting Debt	£ 81.60
08.06.12	HKM Instruct Solicitors Collect B-Soc	£ 90.00
08.06.12	SLS Instruct Solicitors Collect B Soc	£ 65.00
06.08.12	Marsdens Solicitors Fees	£484.00
30.11.12	Interest on Instructing Solicitors	£ 13.26
30.11.12	Interest on Solicitors Fees	£ 10.87
30.11.12	Interest on Hamilton King Fees	£ 12.56
(Collectively the Section 146 Charges)		
30.11.12	Interest on Ground Rent	£ 20.62
30.11.12	Interest on Miscellaneous Charges	£ 35.29

28. First we shall take the charges we have banded together collectively as the Section 146 Charges. Despite the Directions given the Respondent has provided precious little information about these charges. No invoices, receipts or demands have been provided, no explanations have been given and no effort made to try and demonstrate that the charges were reasonably incurred and are reasonable in amount.

29. Doing the best we can with the limited information available it would appear that Hamilton King served upon Mr Marshall a notice pursuant to section 146 Law of Property Act 1925 (LPA 1925). A letter to this effect is at [21] and the notice is at [22-25]. It appears that the notice dated 8 June 2012 was drafted by Marsdens Solicitors but the drafting is curious, bordering on the puzzling. The notice makes reference to the covenant to pay rent, alleges a breach and requires that breach to be remedied by the payment of the sum of £4,620.48. No breakdown of that figure is given. What is plain from the account at [38] is that as at 23 March 2012 the debit balance on the account was stated to be £4,620.48 but this was not all rent or service charge arrears and included a very substantial amount of alleged administration charges.

30. What is also curious is how it is that both the Respondent and its managing agents incur costs in instructing solicitors to draft such a notice and this has not been explained to us.

31. Section 146 LPA sets out a scheme to restrict forfeiture of a lease for breach and a scheme for the granting of relief from forfeiture by the court in certain circumstances. By subsection (1) a right of re-entry of forfeiture is not to be enforceable unless and until the landlord has first served on the tenant a notice setting out prescribed information and giving the tenant a reasonable time in which to remedy the alleged breach. The intention of the provision is that before taking steps to forfeit a landlord must put his tenant on notice of an alleged breach and

give his tenant a reasonable time to remedy the breach, insofar as the breach is capable of remedy.

32. However, by subsection (11) the requirement to serve a notice does not apply where the alleged breach is the non-payment of rent. Thus it has never been necessary to serve a section 146 notice prior to taking steps to forfeit a lease for non-payment of rent.
33. It is clear from the lease that the service charges payable are reserved as rent. It was held by the Court of Appeal in *Escalus Properties Ltd v Robinson* [1996] QB 321 that service of a section 146 notice was not required as a preliminary to forfeiture for non-payment of a service charge reserved as rent. This is emphasised in *Woodfall: Landlord and Tenant* at paragraph 7.175.1. Further at paragraph 7.203.4 the editors of *Woodfall* suggest that the provisions of section 81 of the Housing Act 1996 do not apply where the service charge is reserved as rent.
34. By 25 May 2012 the Respondent had obtained a default judgment which amounted to a determination that service charges and other charges claimed were payable. In those circumstances it was totally unnecessary that the Respondent should serve a section 146 notice as preliminary to seek forfeiture of the lease. It was open to the Respondent to issue possession proceedings straightaway if that was the course it wished to follow. In so far as the sum of £4,620.48 claimed in the section 146 notice may have included some administration charges, a notice would have been required for such charges but the notice did not allege a breach of failure to pay administration charges; it alleged only a breach of covenant to pay rent.
35. In these circumstances we find that the charges claimed in relation to issue and service of the section 146 notice were not reasonably incurred because it was not necessary or reasonable to incur them.
36. Further and in so far as may be relevant we were not satisfied that the amount of the charges imposed was reasonable. No evidence was provided that the costs had been incurred and no explanation of them has been given to us. It will be noted that the first charge imposed simply says "Section 146 £235" but it was not explained how that charge arose, to whom it was paid and for what. Further we have not been provided with copies of the demands for any of the charges imposed. We have already commented that it was not explained why both the Respondent and its managing agents incurred costs in instructing the solicitors to draft the notice.
37. Having made the above decision, it follows that the various interest charges imposed for failure to pay the charges related to the section 146 notice are also not payable by Mr Marshall. Accordingly and for the avoidance of doubt we reiterate that none of the charges collectively referred to as the Section 146 Charges are payable by Mr Marshall.

38. The next charge to consider is the charge to interest on ground rent in the sum of £20.62. In her reply Ms Farquhar states plainly that: “*we do not dispute interest charges made on ground rent.*” As this charge is not disputed we have determined that it is payable by Mr Marshall.
39. The final charge to consider is the charge to interest on Miscellaneous Charges in the sum of £35.29. The Respondent’s statement of case does not mention this charge at all, they give no information about it, do not explain it, let alone seek to persuade us that it was reasonably incurred and is reasonable in amount. Moreover they have not provided us with a copy of the demand for this charge. In these circumstances we cannot be satisfied that the charge was reasonably incurred and is reasonable in amount. Thus we determine that it is not payable by Mr Marshall.

The Schedule Material provisions of Schedule 11

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.*
- (2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.*
- (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.*
- (4) An order amending sub-paragraph (1) may be made by the appropriate national authority.*
2. *A variable administration charge is payable only to the extent that the amount of the charge is reasonable.*
3. (1) *Any party to a lease of a dwelling may apply to the appropriate tribunal for an order varying the lease in such manner as is specified in the application on the grounds that—*
- (a) any administration charge specified in the lease is unreasonable,*
 - or*

(b) any formula specified in the lease in accordance with which any administration charge is calculated is unreasonable.

(2) If the grounds on which the application was made are established to the satisfaction of the tribunal, it may make an order varying the lease in such manner as is specified in the order.

(3) The variation specified in the order may be—
(a) the variation specified in the application, or
(b) such other variation as the tribunal thinks fit.

(4) The tribunal may, instead of making an order varying the lease in such manner as is specified in the order, make an order directing the parties to the lease to vary it in such manner as is so specified.

(5) The tribunal may by order direct that a memorandum of any variation of a lease effected by virtue of this paragraph be endorsed on such documents as are specified in the order.

(6) Any such variation of a lease shall be binding not only on the parties to the lease for the time being but also on other persons (including any predecessors in title), whether or not they were parties to the proceedings in which the order was made.

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 the 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 the 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.

(4) No application under sub-paragraph (1) 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

- (a) in a particular manner, or*
- (b) on particular evidence,*

of any question which may be the subject matter of an application under sub-paragraph (1).