12216

First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/22UB/LSC/2017/0039**
Property	:	**63 The Icon, Basildon, SS14 1FH**
Applicant Represented by	:	**Avon Ground Rents Ltd. Amy Just of counsel (Scott Cohen)**
Respondent	:	**Sarah Louise Child Self representing**
Date of Transfer from the County Court at Chelmsford	:	**9th January 2017**
Type of Application	:	**to determine reasonableness and payability of service charges and administration charges**
The Tribunal	:	**Bruce Edgington (Lawyer Chair) Evelyn Flint DMS FRICS IRRV Lorraine Hart**
Date and place of Hearing	:	**8th June 2017 at Basildon Magistrates' Court, Great Oaks, Basildon, SS14 1EH**

DECISION

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1. The Tribunal determines that of the claim for ground rent, service charges and administration charges in the total sum of £1,698.18, the sum of £541.16 is reasonable and payable forthwith. In addition, the Tribunal finds that administration charges incurred as costs of these proceedings are payable in the sum of £2,255.80 which includes VAT payable on all administration fees. The total payable is therefore £2,796.96.

Reasons

Introduction

2. Court proceedings were issued by the Applicant for £1,698.18 for service charges and administration charges plus court fee of £115 and *inter partes* costs on or about 6th October 2016.

3. A defence was filed which said, in effect, that the Respondent had not received any demands for the monies claimed. She had moved home in February 2016. She had paid all prior claims on time and had both written to and telephoned the managing agents Y & Y Management Ltd. but they had, in effect, ignored her. The first she knew about the outstanding charges was after the matter had been referred to solicitors. She says that the charges for debt collection and solicitors' costs are excessive.

4. A bundle of documents was duly lodged but solicitors should understand that putting many duplicates of documents in a bundle is a waste of money and very time consuming for the Tribunal members. As a simple example, there are no less than 3 copies of the 18 page lease.

The Lease

5. The lease is dated the 22nd October 2009 and is for a term of 125 years from 25th December 2006 with an increasing annual ground rent. The lease provides that the Applicant shall insure the property and keep the building and grounds in repair. It can then recover proportions of the cost of so doing from the leaseholder. These proportions are not disputed. Payments on account can be recovered.

6. Clause 6(b) confirms that the Applicant can recover interest on any outstanding amounts at 10% per annum whilst the National Westminster Bank PLC base lending rate is less than 6%, which it has been for the relevant period.

7. As to administration charges relating to litigation costs, clause 1(b) of the Fourth Schedule provides that enforcement of the collection of monies payable under the terms of the lease attracts all costs payable by the Applicant on an indemnity basis. This includes solicitors' fees.

The Law

8. Paragraph 1 of Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") ("the Schedule") defines an administration charge as being:-

> *"an amount payable by a tenant of a dwelling 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."*

9. Paragraph 2 of the Schedule, which applies to amounts payable after 30th September 2003, then says:-

> *"a variable administration charge is payable only to the extent that the amount of the charge is reasonable"*

10. Demands for service charges, administration charges and ground rent have to be in a particular statutory form.

11. Section 7 of the **Interpretation Act 1978** says that where statute authorises any document to be served, given or sent by post, then it is

deemed to be served, unless the contrary is proved, "*at the time at which the letter would be delivered in the ordinary course of post*".

The Inspection

12. As the dispute in this case does not deal with whether the service charges claimed are reasonable, the members of the Tribunal did not feel it necessary to inspect the property prior to the hearing, particularly as they have now been paid.

The Hearing

13. The hearing was attended by Ms. Just of counsel, Adam Azoulay from the managing agents and the Respondent Sarah Child. There was some discussion at the commencement of the hearing because counsel wanted to know the basis on which any assessment of costs was to be made. The Tribunal chair had caused a letter to be written to the Applicant's solicitors a week before the hearing asking for any costs schedule as he intended to act as a county court judge to deal with any county court matters and avoid a further hearing. This arose because of a fairly recent change to the **County Courts Act 1984**. Sub-sections 5(2)(t) and (u) were amended by the **Crime and Courts Act 2013** so that First-tier Tribunal judges became County Court judges.

14. The chair then explained to Ms. Just that he intended to allocate the case to the Small Claims Track and, if the Applicant was successful, he would award the court fee, the Tribunal would determine the costs claimed contractually as administration charges and judgment would be entered. Ms. Just said that she was concerned about this as the costs were to be assessed on an indemnity basis and in the county court, proportionality would not really be an issue.

15. The chair mentioned the case of **BNM v MGN Ltd.** [2016] EWHC B13 (Costs) which deals specifically with proportionality in the county court and as Ms. Just did not appear to be aware of the case, the chair said that he would mention it in the written decision.

16. Mr. Azoulay gave evidence and said that he dealt with this development of 121 properties to the exclusion of anyone else. He manages some 3,500 properties. He confirmed his written statement that the demands for service charges and ground rent had been sent on the 27th November 2015, 17th December 2015 and 19th May 2016. Further he had sent 2 letters to the Respondent before his letter of the 3rd August 2016 warning her that unless payment of £1,991.00 was made by return of post, court proceedings would be issued.

17. Mr. Azoulay was questioned by the Respondent and the Tribunal about his company's procedures. He said that he is in charge of letters going out and in this case he sent 2 letters before the letter of the 3rd August 2016. He could not produce the first letter. It was the sending of these letters which prompted the fixed fee of £144 to be added to the account. His company's conditions of service, at page C107 in the bundle, say that included in the management fee is work necessary to collect current and ongoing service charge arrears but not legal action. The RICS code of practice says much the same.

18. He agreed that the total management fee for this development is £30,996.00 for 2016 which equates to about £205 per flat plus VAT. Mr. Azoulay said that this was not the precise figure for each flat as the proportions of service charges were not the same for each flat. However, he agreed that this was a 'ball park' figure. For a relatively new development with 121 properties, the Tribunal considers that this is at the very top end of the range of management fees. Figures of £102-150 per flat would be more usual.

19. Ms. Child then gave evidence. She said that she could not produce a copy of the letter she wrote in February 2016 advising of the change of address. In fact she let out her old property when she moved and this is why she was able to call in to the old property on a weekly basis to collect post. She did this for a couple of months and then her tenant would contact her if anything came. She insisted that she received none of the demands for service charges in November and December 2015 or May 2016.

20. On being questioned by the Tribunal chair, Ms. Child could not explain why she had not at least tendered the ground rent when she knew that this would be payable under the terms of the lease. She may not have had a demand, but she knew the amount and if she was in fact worried that monies were properly due, it would have solved all this problem if she had written in clear terms saying that she had had no demands, that she had moved and was paying the ground rent as a gesture of goodwill pending receipt of any other demands.

21. She said that it was the managing agent's policy not to send any demands once the matter had gone to solicitors and she wondered whether there had been an earlier alleged breach which had caused the demands to stop earlier than August 2016. Mr. Azoulay confirmed the policy but denied that there was an earlier breach which had caused demands to cease.

22. Finally, the Tribunal chair asked whether any further issues needed to be dealt with and Ms. Just asked for some indication as to items that concerned the Tribunal on the costs schedule. One or two items were mentioned but it was pointed out that as this was largely a Tribunal decision and as the costs schedule had not been filed in time for the Tribunal members to consider it, it was impossible to be more specific.

Discussion – service charges

23. The first issue for the Tribunal to determine is whether the Respondent received any demands for payment before she moved home in February 2016 from 12 Bramstead, Laindon, SS15 6QU to 101 Millfields, Writtle, Chelmsford, CM1 3LJ. The next question is whether the Applicant or the managing agent had been told of the Respondent's move in February 2016. The Respondent's admission in her statement on page D2 of the bundle that she visited her old property on a weekly basis thereafter makes this a little less relevant. Thirdly, have the demands been sent with the relevant statutory information to make the claims payable in law?

24. Assuming that the Tribunal finds that the Respondent was or should have been aware of amounts outstanding and they have been properly claimed,

the question of the administration charges and their reasonableness becomes relevant. It must be noted that subject to the issue of reasonableness, these are assessed on an indemnity basis and the Applicant has produced a copy of the management agreement for the relevant period in the bundle at page C99 onwards. The agreement relating to the fees charged by the solicitors is at page C97.

25. As to the first point, the evidence from Mr. Azoulay is that demands with the appropriate statutory information were sent on or about the dates they have on them to 12 Brampstead, Laidon, Essex SS15 6QU which is the correct postcode and road but the town is incorrectly spelt. It is Laindon. The Tribunal considers, and determines, that an envelope wrongly addressed in this way would probably, on balance, have been received at the correct address. Certainly earlier demands appear to have been received. The next evidence is that the Tribunal has seen copies of the demands allegedly sent in November and December 2015. A copy of the letter allegedly sent by the Respondent in or around February has not been produced. She just alleges that the demands were not received and that the managing agents have not produced proof of posting. She has not either. She has not produced any corroborative evidence at all.

26. As to the second issue, the evidence from Mr. Azoulay was that if a change of address had come into the office, their system would have been altered. He was convinced that no such communication had come in. In any event, as has been said, the issue is not so relevant as Ms. Child obtained post from her old property.

Discussion – Administration charges

27. As to costs, CPR 27.14 makes it clear that the only *inter partes* solicitors' costs to be allowed in this sort of Small Claims Track case where conduct is not in issue are those fixed costs attributable to issuing the claim i.e. £80 in this case plus the court fee. As the total costs of the action are being assessed as administration charges, no separate amount is ordered to be paid in addition.

28. The case of **BNM v MGN Ltd.** [2016] EWHC B13 (Costs) was determined by Master Gordon-Saker and set out how proportionality should be considered in costs assessed in the post Jackson world when costs were assessed on the standard basis. Significantly, the case also determined that his new approach should apply to additional funding arrangements. The **Civil Procedure Rules** say that proportionality is only specifically applied to assessments on the standard basis. Rule 44.4 makes this clear. However, assessments on an indemnity basis have to consider reasonableness using, amongst other things, the list of 8 criteria set out in 44.4(3) i.e. conduct of the parties, efforts made to resolve issues, the value of the claim etc. In other words, a claim for a small amount of money could affect the amount of costs awarded.

29. This was one of the issues in **BNM** which caused Master Gordon-Saker to decide that costs which had been reasonably and necessarily incurred were to be cut in half. Thus, although proportionality is not mentioned by name, it is clear that it has some relevance according to the rule 43.4(3) list. Thus the rule is that a form of proportionality, i.e. the amount of the

claim etc., can be used as one of the criteria for decided that costs have been reasonably and necessarily incurred. This seems to be the same basic rule adopted by this Tribunal in assessing administration charges.

30. Finally, on this topic, rule 44.5 sets out the criteria to be used by the court in assessing costs contractually incurred which are as set out above. In other words, any suggestion that a client can instruct their solicitors to just run up an unreasonable bill on the basis that they will be recoverable under the indemnity costs rule is simply wrong. Further, and in answer to one point made by Ms. Just, fixed costs are not reasonable just because they are fixed.

31. As to the solicitors' costs, it has already been indicated that just because the costs as between Scott Cohen and their client are fixed to suit their joint commercial needs, does not mean that they are automatically reasonable for a paying third party in each individual case. In this case, there are 2 'sets' of costs and fees i.e. the pre proceedings and the post proceedings amounts. For the first 'set' there is a claim for £840 and the evidence was that this was to cover receiving instructions, issuing pre-proceedings letters and issuing such proceedings.

32. Again, the evidence was that Mr. Azoulay sent in a copy of the statement of account and, presumably, copies of the 3 chasing letters. These solicitors have a close relationship with these managing agents. The pre-proceedings letters and claim form will be template documents. No more than .25 of an hour could reasonably have been spent by the fee earner in considering the instructions, dictation for the opening of a file and ordering the standard letter to be sent plus .25 of an hour for the standard claim form to be issued. There are number of e-mails and letters but these should have taken no more than another .25 of an hour because many of them were unreasonable in themselves for reasons set out below.

33. As to the costs for summary assessment in form N260, the first issue is the hourly rate. £250 per hour has been claimed for a Grade B fee earner i.e. a solicitor with more than 4 years post qualification experience. The last guideline rates published by the Senior Costs Judge on the instruction of the Master of the Rolls was in 2010. For solicitors in Oxford and the Thames Valley the figure for a Grade B fee earner was £192. Clearly inflation has to be taken into account and that rate would now be £215 or thereabouts.

34. However, should ordinary debt collection work be undertaken by a Grade B fee earner? It is this Tribunal's determination that such work would normally be delegated to a Grade C fee earner and the charging rate for such a person was £161 in 2010 and would be about £180 today. A commercial client expecting to pay these costs without being able to recover them from another party would not expect to pay more than Grade C for this work. The fact that Scott Cohen do not appear to have any other fee earner is not relevant. There was nothing complex or out of the ordinary in this claim.

35. There are some criticisms which can be levelled at the amount of time spent. 1.20 hours spent on correspondence with witnesses is excessive

when there was only one witness whose evidence was relevant. Half an hour is reasonable. In respect of documents, all 3 Tribunal members could not understand how it could take 24 minutes to peruse the defence. It took them much less time. 12 minutes is reasonable. As to the time spent on preparation of the response, the Respondent's statement and the witness statement, these were far too long and repetitive. 1 hour would be reasonable for this work.

36. However, the main issue in this case is whether it was reasonable and/or necessary to run up a bill of £4,425 after payment of the service charges on the 14th October 2016. At that stage, the only claim was for administration charges i.e. costs and fees incurred in the collection process. The following appears to the Tribunal to be relevant:-

- On 12th September 2016, the Respondent spoke and wrote to the solicitors to ask for copies of the invoices for service charges, saying that she would pay them – the response was that the solicitor would take instructions. Why?
- On several occasions, the Respondent asked the Applicant's solicitors for a breakdown of the fees and charges so that she could assess/take advice on whether they were reasonable. That was refused on the basis that such fees and costs were 'fixed' and she is now being charged for asking reasonable and sensible questions which were not answered.
- On 30th September 2016, the Applicant's solicitors were told that the Respondent was taking advice from LEASE but could not speak to anyone until the 6th October. 10 minutes later, the solicitors e-mailed back saying that there was no basis for further delay in the proceedings (which had not been issued). Later in the day, the solicitors said that they were instructed to issue the proceedings by 5th October with a view to forfeiture of the lease. At that stage only £343.02 was outstanding in respect of service charges i.e. less than the forfeiture limit.
- On 6th October, after advice, the Respondent repeated that she wanted a breakdown of the fees and costs and that if this was not forthcoming she was applying to this Tribunal for an assessment of their reasonableness. The response was to say that a breakdown had already been provided which was patently not the case.
- The claim was then issued and the final service charges were paid on the 14th October 2016. An attempt was made by the Respondent to apply to this Tribunal which could not proceed as the court process had already started and was dealing with the same issue.
- When the claim was issued, the administration charges far exceeded the claim for service charges (£343.02) and, in this Tribunal's view, it was incumbent upon the Applicant or its agents or solicitors to just step back and see what was happening. Their refusal to do this or to give details of the administration charges so that the Respondent had the information to assess their reasonableness and could make an offer was incomprehensible. The 'offer' made by the solicitors was not reasonable.

Conclusions

37. The Tribunal is satisfied, on the balance of probabilities, that correct service charge and ground rent demands were posted to the Respondent on the dates referred to and, in accordance with the Interpretation Act 1978, they are deemed to have been received.

38. As to fees claimed by the managing agent, the Tribunal refuses to allow the £144 because it seems absolutely clear that the management fee includes the 3 chasing letters as stated above. As to the other £150 plus VAT claimed, Mr. Azoulay was unable to say whether there had been much correspondence with the solicitor which was the basis on which he said that the charges were due. However, the Tribunal acknowledges that he must have spent time on the statements prepared and the sum of £120 would be a reasonable amount i.e. £100 plus VAT.

39. As to the solicitors' costs, the Tribunal is extremely disappointed in what has happened here. The only conclusion the Tribunal can draw from the evidence is that the solicitors or their agents were just intent on collecting their own fees and charges without considering whether their actions were reasonable. As soon as the service charges were paid, they should have just considered what costs had actually been incurred and offered to settle on that basis.

40. CPR dictates that the court has to consider 'the efforts made, if any, before and during the proceedings in order to try to resolve the dispute' and 'the amount or value of any money or property involved'. The Tribunal considers that these are matters they have to consider as well.

41. At a very early stage in these proceedings, the issues were clear and straightforward i.e. were the administration charges reasonable and reasonably incurred. The Tribunal determines that much of the claim is not reasonable and the costs have not all been reasonably incurred.

42. Before the proceedings were issued, the majority of the service charges were paid; the solicitors and/or their clients refused to allow the Respondent to take advice without threatening to issue the proceedings before the advice was taken and the solicitors said that a breakdown of the work undertaken to calculate the administration charges had been given when this clearly was not the case.

43. On the other hand, it was always open to the Respondent to pay money into court and the fact is that this matter has had to proceed to trial.

44. The following amounts will be allowed as set out in form N260 subject to the reduction in hourly rate and the time deductions set put in paragraph 35 above:-

	£
Pre-proceedings costs (.75 hour @ £180)	135.00
Agent's administration fee	100.00
Correspondence (3.9 hours @ £180)	702.00
Documents (2.4 hours @ £180)	432.00
Attending court (3 hours @ £180)	540.00
VAT (£1,909 @ 20%)	381.80
Tribunal fees	200.00

2,490.80

45. As far as counsel's fees are concerned, the issues in this case were straightforward and did not demand the attention of experienced counsel. That expense was unreasonable. A local solicitors' agent should have been used.

46. In addition to the figures stated, the Respondent will also have to pay the original court fee of £115 and the notice of sublet fee of £96.00. The costs payable on the summons are not payable as an additional figure in view of the amount allowed as pre-proceedings costs.

47. As far as interest is concerned, the amount of £95.16 is allowed. No further claim for interest has been made. As this case could and should have settled almost immediately after the Claim Form was issued, no further interest would have been allowed in any event.

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Bruce Edgington
Regional Judge
13th June 2017

ANNEX - RIGHTS OF APPEAL

i. 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.

ii. 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.

iii. 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.

iv. 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.