FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BG/LSC/2023/0032 CVP/REMOTE**
Property	**:**	**Flat 15 Omega Works, 4 Roach Road London E3 2PD**
Applicant	**:**	**Omegaworks 3 Ltd**
Representative	**:**	**Mr R Miller of Counsel**
Respondents	**:**	**Mr M A Thomas**
Representative	**:**	**In person**
Type of application	**:**	**Sched 11 Commonhold and Leasehold Reform Act 2002**
Tribunal	**:**	**Judge F J Silverman MA LLM Mr S Wheeler MCIEH CEnvH**
Date of hearing		**02 June 2023**
Date of Decision	**:**	**19 June 2023**

This has been a remote hearing via video link which has been consented to by the parties. The form of remote hearing was CVP:REMOTE. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents to which the Tribunal was referred are contained in electronic bundles the contents of which are referred to below. The orders made in these proceedings are described below.

Decision

1. Administration charges totalling £150 are recoverable from the Respondent by virtue of Sched 11 para 1 of the Commonhold and Leasehold Reform Act 2002.
2. The Tribunal has no jurisdiction to determine the reasonableness of legal costs which have not been demanded from the Respondent and thus are not yet payable.
3. This application is re-transferred to the county court .

Reasons

4. This application was transferred to the First-Tier Tribunal (Property Chamber) from the County Court on 02 September 2022 (page 158) in order for the Tribunal "*to determine the payability of administration fees, solicitors fees and costs charged under the lease during the period 11 December 2020 and 27 January 2022 inclusive*". The underlying claim against the Respondent claiming service charge arrears, administration charge arrears, interest, and costs was filed in the county court by the Applicant on 12 May 2022. A default judgment issued by the county court was subsequently set aside on 24 January 2023 (page 154).
5. Directions were issued by the Tribunal on 13 February 2023 (page 159) with a later adjustment to allow the Respondent an extension of time in which to file a supplementary bundle of documents.
6. The hearing took place by CVP video link, to which all parties had agreed, on 02 June 2023 and at which the Applicant was represented by Mr R Miller of Counsel and the Respondent appeared in person. Given the limited nature of the questions to be decided by the Tribunal and the fact that no witness statements had been filed by either party it was agreed to proceed on the basis of submissions from each party. Written submissions had been served by the Applicant but not by the Respondent.
7. A hearing bundle had been filed by the Applicant pages of which are referred to in this document by their digital page number. The Respondent did not agree with the contents of the bundle and filed a supplementary bundle of his own. The latter mainly comprised assorted emails between the parties and although they had been read by the Tribunal were not generally of assistance to the Tribunal given the limited nature of its remit.
8. In accordance with current Practice Directions relating to Covid 19 the Tribunal did not make a physical inspection of the property but was able to obtain an overview of its exterior and location via GPS software. The issues before the Tribunal were capable of resolution without an inspection.
9. The Applicant is the registered freehold proprietor of Flats 1-57, Omega Works, 4 Roach Road, London, E3 2PD [**191**]. The Respondent is the registered leasehold proprietor of Flat 15 ("the Flat") [**26**] pursuant to a lease dated 12 July 2004 made between London Green Limited as landlord and R as tenant [**7**] ("the Lease"). The freehold is managed by Haus Block Management Limited ("Haus").
10. The following clauses of the lease are relevant to the issues to be decided:

a. Clause 3.2: R covenants "*TO pay the service charge calculated in accordance with the third schedule without any sum set off against it*" [**8**];

b. Third Schedule, Paragraph 3: "*On each day on which rent is due under this lease the Tenant is to pay the Landlord an interim service charge instalment*" [**18**];

c. Clause 3.1: R covenants "*TO pay the basic rent by equal half yearly installments in advance on 25 March and 29 September…*" [**8**];

d. Clause 5.1: "*THE Landlord is entitled to forfeit this lease by entering any part of the Property whenever the Tenant: (i) is fourteen days late in paying any rent, even if it was not formally demanded (ii) has not complied with any obligation in this lease*" [**13**];

e. Clause 3.27: R covenants "*TO pay all reasonable expenses (including legal and surveyors' fees) which the Landlord incurs in contemplation of and in preparing and serving: (i) a notice under section 146 of the Law of Property Act 1925, even if forfeiture is avoided without a court order*" [**11**].

11. The brief history of the facts leading to this application are that in 2018 owing to personal circumstances the Respondent began to accrue arrears of service charge payments which, with the Applicant's consent, he attempted to reduce by making monthly payments. However, arrears began to accumulate again in late 2019 and were then exacerbated by the Covid pandemic.
12. Eventually the Applicant instructed LMP Law Limited to write a Letter of Claim on 28 April 2021 [**202**] which sought payment of service charge arrears, administration charges, interest, and disbursements and made clear that: "*We are legally obliged to warn you at this stage that we are instructed to pursue a claim for possession on the grounds of forfeiture of your lease against you*" [**203**].
13. The Respondent had therefore been warned that forfeiture proceedings might be taken against him and the Applicant argues that this warning triggered clause 3.27 (above) which would enable the Applicant to recover administration charges and legal costs from the Respondent.
14. By the date of the Tribunal hearing only two sums remained in dispute: £150 in administration charges and £1,450 in legal fees relating to the legal costs of the litigation. Neither of these figures was disputed by the Respondent.
15. The Respondent claimed that the Applicant was acting unreasonably because they had refused to accept an offer he had made to pay in instalments. He was reminded by the Tribunal that in the most basic terms an 'offer' made by him required an 'acceptance' from the Applicant in order to make a binding contract. In the present case it was quite clear that the Applicant had chosen not to accept the Respondent's offer and

so no contract to pay by instalments had ever come into being. He had however rejected the instalment terms proposed to him by the Applicant. At the hearing the Respondent claimed to have offered to pay the arears in full directly to the freeholder in June 2021 but this was disputed by the Applicant. The Respondent did not challenge the amounts now said to be outstanding.

16. In relation to the administration charges totalling £150, their recovery is enabled by the activation of Clause 3.27 above which in turn was activated by the Respondent being in arrears with payments of his (rent and) service charges for more than 14 days. They are thus recoverable by virtue of Sched 11 para 1 of the Commonhold and Leasehold Reform Act 2002.
17. The situation in respect of the legal costs is more complex because although assessed at £1,450 the costs have not yet been formally demanded and so are not due and payable, neither, for the same reason, have they converted into administration charges to which the reasoning above (para 13) would apply.
18. In *Avon Ground Rents Ltd v Child* [2018] H.L.R. 44, the Upper Tribunal considered the jurisdiction of the FTT to consider the reasonableness of legal fees which had not yet become administration charges. Mr Justice Holgate decided that there was no such jurisdiction because *'as at the date of the hearing … such costs had not yet become payable under the relevant provisions of the respondent's lease nor had there yet been any demand made for their recovery so that they had not yet become "administration charges" within Sch.11 para.1(1) of the 2002 Act; nor had the issue of their reasonableness yet been referred to the FTT. As such, the FTT was not yet seised of any jurisdiction over such costs*'.
19. The present case differs from Avon because the question of the consideration of the reasonableness of administration costs has specifically been referred to the Tribunal. However, since the costs in question have not yet metamorphosed into 'administration charges' (as above) the Tribunal does not consider that it has jurisdiction to determine their reasonableness. It is not possible to determine the reasonableness of something which does not yet exist. This item will therefore have to be remitted back to the county court for its further consideration under that jurisdiction.
20. The Tribunal notes that the Respondent had not raised any issue relating to the amount of these disputed sums and also that the charging rates applied by the Applicant's solicitors were within the bands of reasonable rates charged for the appropriate grade of personnel working in provincial solicitors' firms at the relevant time. It is possible that the Tribunal would have approved these charges as reasonable if it had the jurisdiction to do so.
21. The alternative approach suggested by Counsel for the Applicant's is that the charges could be assessed under then Schedule 11, Paragraph 5A of the 2002 Act as they are litigation costs "*to be incurred*".
22. This paragraph would normally be used, like its sibling provision in s20C Landlord and Tenant Act 1985, in conjunction with limiting a landlord's ability to impose a costs burden on a tenant in cases where the current litigation has found fault with the landlord's conduct. The Tribunal is not aware of any decided case where it has been used, as is suggested

here, in favour of a defaulting tenant and does not consider it appropriate to do so in this case.

23. This application is re-transferred to the county court for the outstanding issues to be dealt with.

24. The Law

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 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.

Schedule 11, paragraph 2

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

Schedule 11, paragraph 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).

Judge F J Silverman
19 June 2023

Note:

RIGHTS OF 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 by email to London.Rap@justice.gov.uk.
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.