UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2015] UKUT 0362 (LC)
LT Case Number: LRX/119/2014

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – Administration Charges – whether legal expenses incurred in contemplation of proceedings under section 146, Law of Property Act 1925 – whether appeal compromised on payment of service charge arrears by third party mortgagee – appeal dismissed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN

CATHERINE MARY WILLENS

Appellant

and

INFLUENTIAL CONSULTANTS LTD

Respondent

Re: Flat B,
301 High Street,
Sheerness
Kent
ME12 1UT

Before Martin Rodger QC, Deputy President
Sitting at: North Kent Magistrates' Court, Chatham
on
7 May 2015

The Appellant appeared in person
ICL was represented by its director, Mr J Thompson

The following case is referred to in this decision:

DECISION

1. Mrs Willens, the appellant, is the lessee of Flat B, on the first floor of 301 High Street, Sheerness. Her landlord is the respondent, Influential Consultants Ltd ("ICL"). There are two other flats in the building, one of which is owned personally by the directors of ICL and the other by a company under their control. Relations between the parties are not good. Since ICL acquired its interest in the building in 2007 six separate applications had been made to tribunals to resolve disputes over service charges and administration charges payable by Mrs Willens. This appeal arises out of a decision by the First-tier Tribunal (Property Chamber) ("the FTT") delivered on 31 July 2014 in which it determined that charges totalling £10,116.22 were payable to ICL for the period from 18 January 2011 to 23 November 2013.

2. Mrs Willens challenges the FTT's decision in relation to one category of expenditure only. The FTT found that she was liable to pay the sum of £2,427 as an administration charge representing legal fees incurred by ICL between 22 January and 12 June 2013 in contemplation of proceedings to be commenced against her in the county court. The FTT considered that Mrs Willens was liable to reimburse these fees pursuant to clause 3(13) of her lease. Clause 3(13) is a covenant by the lessee:

> "To pay all expenses including solicitor's costs and disbursements and surveyors' fees incurred by the Landlord incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 or incurred in or in contemplation of proceedings under sections 146 or 147 of that Act notwithstanding in any such case forfeiture is avoided otherwise than by relief granted by the Court…"

3. In *Barrett v Robinson* [2014] UKUT 0322 (LC) this Tribunal considered the circumstances in which costs incurred in proceedings (including proceedings before the FTT) would be recoverable under a covenant such as clause 3(13). The relevant covenant in that case was clause 4(14) of which, at paragraph 52, the Tribunal said this:

> "Costs will only be incurred in contemplation of proceedings, or the service of a notice under section 146 if, at the time the expenditure is incurred, the landlord has such proceedings or notice in mind as part of the reason for the expenditure. 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 clause 4(14) as providing a contractual right to recover its costs."

4. The Tribunal's decision in *Barrett v Robinson* was issued only a week before the FTT reached its decision in this case. There is no reason why the FTT should have been aware of it when it made its own decision.

5. The FTT provided its reasons for finding that the charge of £2,427 in respect of legal fees was both reasonable and payable by Mrs Willens in schedule 6 to its decision. It referred to a letter of claim issued by ICL's solicitors on 19 February 2013 in which they had threatened court proceedings for the recovery of the total sum of £7,940 then outstanding if that sum was not paid within 7 days. The FTT said that the letter was explicit about ICL's intention to pursue proceedings before the

court and found on that basis that "the fees were incurred in contemplation of proceedings before the court" and for that reason were recoverable under clause 3(13) of the lease.

6. In her application permission to appeal Mrs Willens relied on the Tribunal's decision in *Barrett v Robinson* and said that the correspondence which she had received, and other evidence which she wished to introduce, clearly indicated that ICL had not contemplated forfeiture of her lease but was concerned only to recover the service charges which it claimed to be entitled to. The Tribunal granted permission to appeal and indicated that the appeal would be dealt with as a review with a view to a rehearing. In the event, neither party was legally represented at the hearing of the appeal and both wished to refer to documents and make submissions that had not been considered by the FTT (whose decision had been made without a hearing due to the indisposition of both parties). I therefore dealt with the appeal as a rehearing.

7. Mrs Willens' case was that the correspondence she had received from Kingsley Smith, ICL's solicitors, had made no reference to forfeiture. In particular the letter before action of 19 February 2013, to which the FTT had referred, did not threaten forfeiture. Mrs Willens drew attention to the following passage in that letter:

> "Further your ignoring this letter of claim may lead to our client issuing proceedings against you and thus increase your liability for costs. In the circumstances, unless we receive your acknowledgement to this letter or your remittance in the sum of £7,940.06 within 7 days of the above date, court proceedings will be issued against you for the recovery of the above sum where in addition costs and interest will be claimed."

8. Mrs Willens also referred to an invoice which she had been sent by ICL on or shortly after 22 January 2013 (the first of four such invoices which in aggregate covered the administration charge found due by the FTT). The invoice was described as being for "administration charge in accordance with lease clause 1(2) for the collection of rent by Kingsley Smith Solicitors". This was significant, Mrs Willens suggested, because clause 1(2) of her lease was the lessee's covenant to pay service charges. Under that clause she was obliged to pay, as part of her service charge, a proportion of ICL's expenditure on professional fees in connection with, amongst other things, the collection of rents reserved by the lease. The service charges in her lease were reserved as rent. Mrs Willens suggested that the reference to clause 1(2) in ICL's invoice was another indication that, at the time the costs of instructing Kingsley Smith were incurred, ICL did not have forfeiture proceedings in mind. If it truly had been contemplating the forfeiture of her lease it would at least have referred to clause 3(13) with its express reference to section 146 of the Law of Property Act 1925.

9. After her receipt of the letter before action a substantial correspondence ensued between Mrs Willens and Kingsley Smith in which, as she pointed out, forfeiture was never mentioned.

10. Mr Thompson is a director of ICL and is responsible for the management of the premises in Sheerness. He explained that the company's preferred approach to the recovery of service charge arrears was to commence proceedings in the county court for forfeiture, and he relied on three pieces of evidence in support of that having been his intention in this case.

11. In 2011 ICL's solicitors had served notice under section 146 as a prelude to forfeiture proceedings against Mrs Willens over the non-payment of service charges. Mr Thompson was not able to produce a copy of the section 146 notice itself but it was referred to in a letter dated 10 May 2011 written by ICL's then solicitors, J B Leitch to Mrs Willens mortgagee, Swift Group, in which terms of settlement of proceedings for possession of Mrs Willens' flat were confirmed. The sum which ICL required the mortgagee to pay on the withdrawal of the claim for possession included £460 as "section 146 legal costs."

12. Mr Thompson also told me that a notice under section 146 had been served on Mrs Willens on 20 October 2014, on the strength of the FTT's determination in this case.

13. Finally, and most significantly, Mr Thompson referred to an e-mail which he had sent to Kingsley Smith on 13 February 2013, in the week before the letter before action, which had not been seen by the FTT. He drew attention to two passages in what was quite a long message:

> "**Timing**
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> I believe that you should issue the letter of claim and proceed with the issuing of proceedings as soon as possible and without waiting for the reports etc relating to the additional claims against the debtor. We have in mind, subject to being able to work these up to viability, that these be included as damages within the action for possession which would follow the service of section 146 notice.
>
> **Process**
>
> The company's instruction is to act as solicitor and agent in the collection of rents reserved and other payments to be paid by the tenant by virtue of lease clause 1(1) – ground rent, and clause 1(2) - further or additional rent. In addition we would also wish to instruct in respect of matters incidental to the preparation and service of notice under section 146 of incurred in or in contemplation of proceedings under section 146 i.e. lease clause 3(13)."

The same e-mail went on to describe a sequence of anticipated events beginning with the issuing of a letter of claim, then progressing either to a decision of the LVT or the county court, followed by service of a section 146 notice, before finally culminating in the issuing of county court proceedings for forfeiture. By this route Mr Thompson anticipated that the full sum due would be recovered from Mrs Willens mortgagee.

14. Having now seen the express instructions given by Mr Thompson to ICL's solicitors before the commencement of correspondence with Mrs Willens, I am entirely satisfied that service of a notice under section 146 and, if necessary, proceedings for the forfeiture of Mrs Willens lease, were clearly in the contemplation of ICL at the time it incurred the expenditure on legal fees which the FTT found was recoverable as an administration charge under clause 3(13). The fact that the solicitors themselves did not refer to forfeiture in their correspondence does not detract from the force of Mr Thompson's instructions. The only issue raised by Mrs Willens was whether ICL had the necessary contemplation and I am satisfied that it did and that the FTT came to the right conclusion. Accordingly I dismiss the appeal.

15. Mr Thompson raised one additional point to which I should refer. Following the service of the section 146 notice in October 2014 ICL's solicitors had invited Mrs Willens mortgagee, Swift, to discharge her liability for the charges which the FTT had determined were payable. The mortgagee subsequently paid £13,641.95 (which included ground rent, interest and costs as well as the sums within the FTT's jurisdiction). On 13 November 2014 ICL's solicitors wrote to Swift acknowledging receipt of the payment and describing it as being "in full and final settlement" of the charges determined by the FTT.

16. Mr Thompson argued that payment by the mortgagee of the full amount claimed in the proceedings precluded any further challenge by Mrs Willens herself to her liability and ought to result in her appeal being struck out or dismissed. I do not agree.

17. The proceedings before the FTT had been commenced by Mrs Willens under section 27A, Landlord and Tenant Act 1985 and paragraph 5 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002. They were for the determination of her liability to pay the service charges and administration charges claimed. The right to apply for such a determination applies whether or not any payment has been made (section 27A(2) and paragraph 5(2)). An application may not be made in respect of a matter which has been agreed or admitted "by the tenant" but the tenant is not to be taken to have agreed or admitted any matter by reason only of having made a payment (section 27A(4)-(5) and paragraph 5(4)-(5)). It follows that the mere fact of a payment having been made cannot preclude Mrs Willens from pursuing her appeal. Nor does the description of that payment as being "in full and final satisfaction" of the liability identified by the FTT confer any different status on the payment by the mortgagee. Mrs Willens clearly did not agree that the administration charge was properly due and indeed she had already applied for permission to appeal to the Tribunal by the time the payment was made. While her mortgagee had the right to preserve its security by paying the service charges to prevent a forfeiture, it did not do so as agent for Mrs Willens but on its own behalf. In any event the description of the payment as "in full and final settlement" was made by ICL's solicitor and not by Swift, which may or may not have been aware that the proceedings were continuing. I am therefore satisfied that the making of the payment did not prejudice Mrs Willens entitlement to pursue the appeal.

18. For these reasons the appeal is dismissed.

Martin Rodger QC
Deputy President
29 June 2015