



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

Case reference	:	LON/00BK/LSC2015/0246
Property	:	Flat 4, 14 John Princes Street, London W1G 0JS
Applicant	:	Vichart and Penchit Vorakoondumrong
Representative	:	Sam Madge-Wylde instructed by Mills Chody LLP
Respondent	:	Michael Saunders
Representative	:	Self
Type of application	:	Liability to pay service charges and/or administration charges (County Court proceedings referred)
Tribunal member(s)	:	Judge Hargreaves Michael Taylor FRICS
Date and venue of hearing	:	22nd October 2015 10 Alfred Place, London WC1E 7LR
Date of decision	:	19th November 2015

DECISION

The Tribunal orders as follows:-

1. The Applicants are entitled to recover the sum of £1076.69 by way of arrears of service charges for the period up to 31st March 2015.
2. The sum of £1255 plus VAT where appropriate is a reasonable administration charge but is not payable by the Respondent (see below).
3. The Respondent's counterclaim is dismissed.

4. The case is sent back to the county court to deal with outstanding issues of costs and interest.

REASONS

1. All page references are to those in the trial bundles save where otherwise made clear.
2. By Particulars of Claim in the county court dated 5th March 2015 (p1.4), the Applicants claimed service charges due and outstanding as at 5th March amounting to £2259.42 and legal and surveyor's fees in the sum of £1255 (plus VAT it appears in the case the solicitors' fees), pursuant to paragraphs 23 and 24 of Schedule 4 of the relevant lease which is at 5.8. On 4th June 2015 the proceedings were transferred to the Property Tribunal, and according to the order at 1.47, that included "the claim and counterclaim". The latter was set out in a letter dated 18th April 2015 and is at 1.10. Whatever the precise status of the counterclaim, we deal with the issues raised in it in this decision below.
3. The Applicants' re-pleaded statement of case is at 3.1 which sensibly includes a reply to the Respondent's counterclaim. The Respondent, an accountant, relied heavily by way of defence on a mathematical reconstruction of payments in/payments out (6.2-6.7). The correspondence in tab 6 suggests that this is a dispute which hinges on a dispute about the supply and adequacy of information provided by the Applicant on the one hand, and the Applicant's frustration with the Respondent on the other hand (see eg 6.16-19). The Respondent's counterclaim was taken for the purposes of the hearing to be set out at 6.19.
4. Various points arose at the outset of the hearing on points raised by the Tribunal on the construction of the lease, dated 11th July 1994, by which the term now vested in the Respondent (since 1996) was granted for 907 years from 6th February 1994. The relevant terms of the lease relating to the recovery of service charges, include the following.
5. The property is a fourth floor flat and is one of four residential units. The ground and basement areas are let commercially. In clause (1)(d) of the recitals "*the Estate*" means *the land described in the First Schedule*¹ and "*building*" means *the building converted into flats erected thereon*". Clause (1)(e) defines "*the Flats*" [*as*] *the flats and maisonette forming the building and "flat" has a corresponding meaning*". Clause 1(f) defines "*the retained premises*" [*as*] *those parts of the Estate not included in the flats being the property more particularly described in the Second*

¹ ie "All that land together with the building erected thereon and known as 14 John Princes Street ... registered at HMLR under Title Number 169846" (the freehold title appears to have Title Number 357183 however); see the leasehold title at 5.4 which is NGL716923

Schedule". Clause 1(g) defines "*the Premises*" as ... *the property more particularly described in the Third Schedule*".

6. The Second Schedule is set out at p5.15. The retained premises include (i) what can briefly be described as access areas and "*other parts of the land and buildings forming part of the buildings which are used in common by the occupiers of any two or more of the flats*" (ii) "*the main structural parts of the building*" [etc] but subject to (iii) a proviso that areas (i) and (ii) do not include "*any premises which the Landlord has specifically demised or intends specifically to demise*" which must therefore exclude the areas on the ground floor and basement demised under the commercial lease.
7. The Third Schedule contains an extended definition of the fourth floor flat, with its rights, exceptions and reservations.
8. Put generally, for the purpose of this decision, there is a split between the Estate which includes the building (including the flats) on the one hand, and the retained premises which is any part of the estate/building not otherwise demised, on the other. The relationship between the flats and the commercial premises is arguably not clearly defined, as will be seen, but, as Mr Madge-Wylde submits, "*the building*" includes the flats and the commercial premises and the service charge provisions should be construed on that basis.
9. Turning from the general definitions to the service charge provisions, the following are most relevant. The starting point is clause 2 at 5.9 which simply provides for the tenant to perform the covenants in the Fourth and Seventh Schedules (5.18 and 5.30). The background to the rent provisions is contained in clause 1 of the lease which provides for the tenant to pay (i) the ground rents payable in accordance with the Eighth Schedule and (ii) "*the additional and further rent payable under the provisions of paragraph 2 of the Fourth Schedule*". That provides that the tenant must "*pay to the landlord by way of additional rent by one instalment on the 29th September in each year ... free of deductions in advance and on account ... such estimated sum as shall be reasonably required by the Landlord ... the said additional rent being 25% of the reasonable proper and necessary expense to the Landlord of performing the obligations specified in the Seventh Schedule for the Landlord's current financial year (being the period of twelve months ending the 31st .. January in each year or such other period as the Landlord shall adopt for the purpose of its accounts for the Estate) and as soon as possible following the end of each such financial year the Landlord shall provide the Lessee with a summary of such expenses certified by the Landlord's [agents]*". There is a provision for contractual interest on late payments (see paragraph 31).

10. The Landlord is entitled to charge for the costs referred to in the Seventh Schedule. That in turn includes the costs incurred in complying with the obligations set out in the Fifth Schedule at 5.27. It is quite clear from paragraph 7 of the Fifth Schedule and clause 4(ii) at 5.13, that the Landlord is entitled to create a reserve or sinking fund from payments by the tenants.
11. Apart from pleadings, the only documents provided to the Tribunal by the Applicant, are at tab 4 of the bundle, consisting of certified accounts for the years ending 31st March 2009-2014², with various demands served on the Respondent dated 31st March for the years 2010-2015 (the 2015 demand calculated after the county court proceedings were issued). With the assistance of one of the managing agents, who had not provided a witness statement, but was in court, it was explained that the actual procedure was to send the invoices dated 31st March, out on 1st April, with a budget, followed by the certified accounts with a balancing charge on 30th September. Although we accept that the Respondent had these documents, the Applicant was directed to disclose them and they should have been provided in their entirety, which would have assisted the Tribunal, particularly since it was clear to the Tribunal, on the basis of the tab 4 documents, that the charging regime adopted by the managing agents departed from the contractual scheme provided for by the lease, at least in terms of the financial year and the date on which charges were demanded.
12. Mr Madge-Wylde objected to the Tribunal raising questions about the contractual liability of the Respondent to pay the arrears of service charges when the Respondent himself had not pleaded any such issues. He cited *Birmingham City Council v Keddie & Hill* [2012] UKUT 323 (LC) as authority for the proposition that the Tribunal should not descend to the arena. As against *Keddie* the better approach in our judgment is set out in HHJ Huskinson in *Trafford Housing Trust v Rubinstein* [2013] UKUT 0581; see also *Swanelane Estates Ltd v Woods* LRX/159/2007. To ask a landlord how charges based on an apparently different practical regime are contractually recoverable is a basic function under s27A, whether or not a respondent tenant (often, and in any event in this case a litigant in person) has raised what is a point of construction.
13. He did however submit that the Landlord is entitled as a matter of construction of paragraph 2 of the Fourth Schedule to adopt a different financial year to that ending 29th September because of the words “*or such other period as the Landlord shall adopt...*” and he is therefore correct (and the Tribunal agrees) that the Applicant could change the financial year to that ending 31st March.
14. He also accepted that the evidence was clear that the demands were not made for the payment of one instalment on 29th September,

² Generally prepared about 5-6 months after the end of March

there being a payment on account in March followed by a balancing charge. However he submitted that time is not of the essence of the provisions of paragraph 2 of the Fourth Schedule, and the clause has to be read bearing in mind the fact that 29th September presumably linked in to the original financial year, now changed. Taking the provisions of paragraph 2 of the Fourth Schedule as a whole, it provides that the Tenant is liable to pay a balancing charge after the certified accounts have been provided subject to the provisions of clause 4(ii) of the lease, so the scheme does in fact allow for demands twice a year subject to clause 4(ii).

15. The provisions of clause 4(ii) are important not least because until the hearing they were not understood by the Respondent. Clause 4(ii) (5.13) plainly enables the Landlord to create a reserve fund. See also paragraph 7 of the Fifth Schedule at 5.29. What has happened in this case is that any excess service charges paid have been carried forward to the reserve fund. The Respondent's arithmetical analysis of money in/money out by reference to expenditure, failed to take into account the reserve fund. See for example 4.4 and 4.7 for the year ending March 2009, 4.50 and 4.52-53 for the year ending March 2014.
16. The last point which arose (on the Tribunal's questioning) in relation to the liability of the Respondent to pay the service charges as demanded, concerned the Respondent's liability for Schedule 1 and Schedule 2 charges (see eg 4.8 for 2009 and 4.57 for 2014). There is no question that the Schedule 2 charges which clearly relate to the Flats, are correctly calculated at 25% for the Respondent's flat (see paragraph 2 Fourth Schedule). It is equally clear, and it was accepted by Mr Madge-Wylde, that the lease lacked a clear reference to the Respondent's liability to pay 16.75% of the Schedule 1 expenses in common with the other three flats, the balance of 33% being paid by the commercial unit. The answer to this (as he submitted) is that the Landlord is entitled to charge the residential Tenants in relation to the building as a whole: that includes the commercial unit and the flats, and since 16.75% is less than 25%, the charge is recoverable. It is clear that the additional rent includes the costs to the Landlord of maintaining the Estate (see the Fifth and Seventh Schedule), parts of which are used (for access for example) by the residential Tenants.
17. Moving on to the actual disputes in this case, as it became clear to the Tribunal that the Respondent's real issue (apart from the counterclaim) was with his mathematical computation which had not allowed for the Applicant's use of the reserve fund, so that he claimed he was owed money, the Tribunal gave the parties time to discuss the figures taking this into account. In the end the Respondent and the Applicant reached agreement that (including taking into account the £1000 paid by the Respondent at the end of March 2015 after the issue of county court proceedings and deducting a further sum of £182.75), the amount due by the

Respondent to the Applicant in respect of the claim for the arrears of service charge referred to the Tribunal, is £1076.69.

18. The question of contractual interest pursuant to paragraph 31 of the Fourth Schedule is to be referred to the county court, though there is no reason why the parties should not attempt to agree it.
19. As to the administration charges in the sum of £1255, further directions were given on 22nd October requiring the Landlord to make submissions about recoverability in the light of the decision of Martin Rodger QC, Deputy President of the Upper Tribunal (Lands Chamber) in *Barrett v Robinson* [2014] UKUT 0322 (LC). As the Respondent remarked in his submissions in reply to those of Mr Madge-Wylde, it is not an easy read for a litigant in person. The starting point is to consider where the claim is pleaded: see paragraph 6 of the county court particulars at p1.4 which merely states "*The Claimant is also entitled to his legal and surveyors' fees under the terms of the Lease the current balance being £1255.*" It is correct that there was no specific denial in the Respondent's defence and counterclaim but there is an overall rejection of the Landlords' claims without establishing that the money claimed is due. Further, for the reasons we have already given, we do not consider that *Keddie* deprives the Tribunal of the task of considering whether the administration charges are in fact due and payable.
20. The contractual liability stems from paragraph 23 Fourth Schedule at 5.25 which obliges the Respondent "*To pay to the Landlord all proper and reasonable costs charges and expenses (including all Solicitors' and Surveyors' 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 [rest of the clause is not relevant ...]*". This is not recoverable as rent under the Lease. Mr Madge-Wylde submitted that as the Respondent had not specifically challenged this head of claim, the Tribunal was not concerned to consider it. In the light of the relevant statutory provisions³, the clause as a whole and the lack of factual evidence supplied by the Landlord, and considering *Barrett v Robinson*, the Tribunal disagreed, and gave the Applicants the opportunity of filing evidence and making submissions on the question whether the £1255 claimed was in fact recoverable under this provision of the Lease in these proceedings.
21. Mr Madge-Wylde made further submissions dated 30th October which we have taken into account. He identified the question as being whether the Applicants contemplated forfeiture proceedings when they incurred legal costs (the point on which the landlord failed on the facts relating to a similar clause, in *Barrett*). In paragraph 8 of his submissions he referred to two letters exhibited

³ S158, Schedule 11 Commonhold and Leasehold Reform Act 2002

by the Applicants to a witness statement dated 3rd November 2015 by Danish Ahmed MRICS, dated 24th September 2014 and 18th November 2014. The second letter to the Respondent states at the end, having outlined the then calculated money claim against him, that *"Should you fail to comply with the above, legal proceedings will be issued which may ultimately result in the loss of your leasehold interest."* The Applicants just about, on the balance of probabilities, establish that they were contemplating forfeiture proceedings in the event that the Respondent failed (ultimately) to pay the arrears when they issued proceedings, particularly when noting the advice given in the first letter by Ms Ahmed, to forfeit the lease if necessary.

22. The sum claimed of £1255 (plus VAT where appropriate, at least in the case of the solicitor's rates, it appears) is explained by Ms Ahmed in paragraph 7 of her witness statement. The claim as such is reasonable. However, on the evidence before the Tribunal it is not payable by the Respondent because there is nothing to show that the Applicants made a valid demand for payment in accordance with the requirements of paragraph 4 of Schedule 11 to the CLRA 2002. Consequently, until such notice is served, the Respondent is entitled to withhold payment. Had such a notice been served it would (it is assumed) have been disclosed by the Applicants in response to the directions. We stress that this finding is limited to the evidence before the Tribunal, and the only step required by the Applicants to make the sum payable, is to serve a compliant notice on the Respondent. It is otherwise due and payable.
23. The next issue is the counterclaim (see 1.10 and 6.19). As this matter was referred, the Tribunal deals with it, subject to noting that its content does not strictly fall within a s27A remit.
24. The first point taken by the Respondent is that the management company has charged more than the contractual rate of 15% for managing the building and he is entitled to a refund of overpayments of around £1300 based on his share of an overpayment for the building of over £7800. In other words this is the equivalent of arguing that the management charges are unreasonable. However this argument is based on paragraph 11 of the Seventh Schedule which does not cap the fees recoverable to 15% where managing agents are appointed. In the absence of evidence that the managing agents are charging too much in this case, this point fails on the construction of the lease and on the facts.
25. The second point taken by the Respondent is that he has spent over 20 hours working on the case, which at £82.50 per hour for 20 hours, totals £1650, which he claims to be entitled to be reimbursed. Whether his reduced rate of £82.50 is reasonable or not, Mr Madge-Wylde is correct: the claim fails because the Respondent has no cause of action in respect of these costs, whether

in contract or tort or under the 1985 Act. At most the Tribunal might have awarded the Respondent £19 per hour as a litigant in person if he was entitled to an award of costs pursuant to Tribunal Rule 13, but that is not an issue which the Tribunal is dealing with.

26. The third point taken is that the Respondent is entitled to a credit of £261.82. This point is no longer in issue on the figures agreed between the parties.
27. The fourth point is that he overpaid £1063.53 in 2003 and 2004 to previous managing agents. The answer to that is that this is a restitutionary claim with a 6 year time limit under the 1980 Limitation Act, which is now time barred.
28. Mr Madge-Wylde disclaimed the intention to apply for Rule 13 costs. He made it clear that the question of costs in the county court and s20C costs would be referred to the county court if raised by the Respondent, which duplicates costs and is regrettable, though of course the Tribunal has no jurisdiction over county court costs. The costs incurred by the Landlord on the face of their schedule (over £6000), far exceed the monies they have recouped so there are issues of proportionality, as well as the relationship between such costs and the payment of £1255, though double recoverability would of course be taken into account.

Judge Hargreaves
Michael Taylor FRICS
19th November 2015