



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) &
IN THE COUNTY COURT at Watford, sitting at 10
Alfred Place, London WC1E 7LR**

Tribunal reference : LON/00BG/LSC/2020/0162

HMCTS code (paper, video, audio): V: CVPREMOTE

Court claim number : G12YX158

Property : Flat 23, 1 Twig Folly Close, E2 0SU

Applicant/Claimant : Freehold Managers (Nominees) Limited

Representative : JB Leitch Ltd (Ms Whittington of Counsel)

Respondent/Defendant : Mr Bimal Govind Kotecha

Representative :

Type of application: Liability to pay service charges and administration charges

Tribunal members : Judge Simon Brilliant, Mr S Mason FRICS and Ms L West

In the County Court : Judge Simon Brilliant (sitting as a District Judge of the County Court)
Mr S Mason FRICS and Ms L West (sitting as assessors)

Date of hearing : 11 January 2021

Date of decision : 01 March 2021

DECISION

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Those parts of this decision that relate to County Court matters will take effect from the “Hand Down Date” which will be:

(a) if an application is made for permission to appeal within the 28 day time limit set out below - 2 days after the decision on that application since this decision was sent to the parties; or

(b) if no application is made for permission to appeal, 30 days from the date that this decision was sent to the parties.

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been not objected to by the parties. The form of remote hearing was by video V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and no-one requested the same. The documents that we were referred to are in electronic bundles and emails

Summary of the decisions made by the tribunal

1. The following sums are payable by the Respondent/Defendant (“the tenant”) to the Applicant/Claimant (“the landlord”) by 4.00 pm 04 April 2021:

(i) Service charges: £4,071.21.

(ii) Administration charges: £168.00.

Summary of the decisions made by the County Court

2. The following sums are payable by the tenant to the landlord by 4.00 pm 04 April 2021:

(iii) Interest on the above sums: £314.31 until 01 March 2021 and thereafter at the rate of 0.46p per day until payment of the above sums.

(iv) Legal costs under clause 3.12 of the lease: £10,835.32.

Background

3. The landlord issued proceedings against the tenant on 24 January 2020 in the County Court Money Claims Centre under claim number G12YX158. The tenant filed a Defence on 07 February 2020. The landlord served a Reply subsequently. The proceedings were then transferred to the County Court at Watford on 06 April 2020 and then to this tribunal by the order of District Judge Chesterfield dated 22 May 2020.

4. The tribunal issued directions on 07 August 2020 and the matter duly came to a remote hearing on 11 January 2020. Ms Whittington of counsel appeared for the landlord. The tenant appeared in person. The subject property is a third floor flat in a block of 23 flats together with a single parking space (“the flat”). The block is one of three in the development. There are 54 flats altogether.

5. The tenant holds a long lease of the flat, which requires the landlord to provide services and for the tenant to contribute towards their costs by way a variable service charge. The specific provisions of the lease will be referred to below, where appropriate.

6. The claim against the tenant in the County Court comprised the following:

- (i) Service charges amounting to £4,071.21.
- (ii) Administration charges of £168.00.
- (iii) Interest.
- (iv) Legal costs of the proceedings.

7. The order transferring issues to the tribunal was in very wide terms:

1. *The claim be transferred to the First-tier Tribunal (Property Chamber) to resolve all matters falling within the jurisdiction of the Tribunal.*

2. *A Tribunal Judge sitting as a County Court Judge exercising the jurisdiction of the District Judge in accordance with the County Courts Act 1984 as amended by the Crime and Courts Act 2013 can determine any aspects of the claim outside the Tribunal's jurisdiction.*

8. All tribunal judges are now judges of the County Court. Accordingly, where tribunal judges sit in the capacity as judges of the County Court, they have jurisdiction to determine issues relating to ground rent, interest or costs, that would normally not be dealt with by the tribunal.

9. Accordingly, the tribunal gave directions to the parties on 07 August 2020 informing them that all the issues in the proceedings would be decided by a combination of (1) the tribunal and (2) the tribunal judge sitting as a judge of the County Court.

10. Accordingly, Judge Brilliant presided over both parts of the hearing, which has resolved all matters before both the tribunal and the court. The tribunal members, Mr S Mason and Ms L West, sat as such in respect of those matters falling within the jurisdiction of the tribunal. They sat as assessors assisting him in the those matters falling within the jurisdiction of the County Court.

11. This decision will act as both the reasons for the tribunal decision and the reasoned judgment of the County Court.

The lease

12. The tenant holds under a lease dated 09 July 1999 for a term of 999 years from

01 January 1998 (“the lease”). The tenant is under an obligation to pay the landlord¹ an annual contribution towards the service charge expenditure (clause 3(2)). The service charge year is 31 March to 30 March. The landlord must provide an estimate of the costs likely to be incurred in the following 12 months on or before 31 March in each year (clause 3(2)(a)). The annual contribution is payable by two equal instalments in advance in each year on 31 March and 30 September (clause 3(2)(c)). The tenant pays a set percentage of the total service charge expenditure (clause 3(2)(b)).

13. The services which the landlord is under an obligation in clause 4 to provide (the cost of which is recoverable through the service charge) include such matters as structural repairs to and decoration of the block, keeping the internal common parts clean and lighted, keeping the external common parts in good repair and condition, insuring the block and maintaining the private road.

14. The landlord is also entitled to appoint managing agents and to pay their proper fees in connection with the enforcement of the tenant’s covenants (clause 4(4)). Any such payment passed on to an individual tenant would amount to an administration charge.

15. The liability of the tenant to pay to the landlord such administration charges or legal costs is contained in clause 3(12):

From time to time to pay on demand all reasonable costs charges and expenses (including legal costs and surveyor’s fees) incurred by the [landlord] for the purposes of or incidental to the preparation and service of ... any Notice under the provisions of Sections 146 or 147 of the Law of Property Act 1925 ... notwithstanding that forfeiture be avoided otherwise than by relief granted by the Court

16. Clause 7 provides that if any money payable by the tenant is not paid within 14 days the tenant shall pay interest at the rate of 4% above the National Westminster Bank plc Base Rate for the time being in force.

The service charges

17. The claim for service charges consists of:

(a) service charges on account 31 March 2019 to 29 September 2019:
£1,101.17;

(b) reserve fund on account 31 March 2019 to 29 September 2019:
£2,970.04.²

18. These are the on account and estimated half yearly payments required to be paid under clause 3(2) of the lease.

¹ The Landlord has stepped into the shoes of the managing company (the original covenantee) in the events which have happened and in accordance with the lease. The landlord employs Rendall & Rittner Ltd as the managing agents.

² Clause 2(2)(a) of the lease provides for the payment of a contribution towards a reserve fund to be included within the service charge.

19. We asked the tenant why he had objected to paying these charges.
20. He set out at length, as he had done in his emails (which were treated by the tribunal as his witness evidence) a considerable number of complaints about what he regarded as the numerous failures of the landlord and/or the managing agents properly to comply with their repairing and maintenance obligations set out in clause 4 of the lease.
21. He said that he had become particularly concerned as a father with a number of safety problems which he said endangered his family. He felt unable to live at the flat himself anymore and had rented it out. His tenants had recently been burgled on two occasions.
22. We do not doubt the sincerity with which the tenant makes these complaints.
23. Ms Whittington argued that none of this was relevant. The amounts which had been demanded but had not been paid were simply estimated payments on account. There were not payments which had been made in respect of particular items of work. Accordingly, the tenant had, she submitted, no defence in respect of the sums demanded.
24. The tribunal retired to consider this submission. We agree with it. There is nothing on the face of the demands for this anticipated expenditure which strikes us as being unrealistic or improper. Nor was it suggested. At the heart of the tenant's case was the argument that the obligation to pay the advance service charge was dependent upon the landlord complying with its repairing obligations.
25. We prefer the submissions of the landlord. These are not mutually dependent rights but independent ones. The tenant cannot set up the breaches of covenant alleged by him against the claim of the landlord to be paid the advance service charges. The proper course for the tenant to take if he wishes to pursue his claims is by bringing an application under s.27A Landlord and Tenant Act 1985 so that the tribunal can determine his liability to pay the actual service charges raised by the landlord. In any event, there has been no quantification of the tenant's grievances
26. In short, the tenant has chosen the wrong battle to fight. We can understand that in other areas of contract law (with which the tenant may be more familiar) obligations are often of a mutual nature. But that is not the case here.
27. We should also say that, to his credit, the tenant has a very good payment history. As far as we are aware that there have been no previous disputes.
28. Since we do not consider that the tenant's complaints can in principle reduce or extinguish his liability to pay the advance service charges, it was not necessary for us to consider whether all or any of these complaints are borne out. It was therefore not necessary for us to hear any witness evidence in respect thereof.

Interest

29. The landlord is entitled to contractual interest under clause 7 of the lease. The sum awarded amounts to £314.31 as of the date hereof, continuing at 0.46p per day

until payment.

Costs

30. In a letter dated 13 May 2019, the landlord's solicitors wrote to the tenant warning him that, if he did not pay the amounts due, legal proceedings would be issued which may ultimately result in the loss of his leasehold interest. In our judgment, clause 3(12) of the lease is engaged (see the discussion of such wording in Kensquare Ltd v Boakye [2020] UKUT 359 (LC)).

31. We, nevertheless, had concerns about the question of costs. We have already referred to the tenant's excellent payment record. More importantly, he drew our attention to a number of attempts on his part to settle the proceedings before they came to trial. In particular, on 16 November 2020, he attempted to pay a cheque in the sum of £8,307.81 into JB Leitch Ltd's client account. Unfortunately, this payment was never received because it was rejected by the tenant's bank.

32. Then, on 03 December 2020, the tenant posted a cheque to JB Leitch Ltd in the sum of £7,390.58. The landlord declined to cash this.

33. It is a great shame that there was not more effort on the part of the landlord to try and agree terms in the light of these offers. However, on a careful analysis of what did in effect transpire, we are unable to depart from the usual rule that costs must follow the event.

34. It is clear that the tenant cannot rely upon the common law defence of tender. There is no evidence that the tenant offered to pay the full amount due prior to the commencement of the proceedings. Even if he had made such an offer, where a defendant wishes to rely on a defence of tender before claim he must make a payment into court of the amount he says was tendered (see CPR 37.2).

35. Was it unreasonable for the landlord not to accept the offer of £7,390.58 made on 03 December 2020? The difficulty for the tenant is that by that late stage a great deal of the landlord's costs had already been incurred. In his email dated 02 December 2020, the tenant provides a breakdown of this offer and it only relates to service charges. It does not contain any element of costs.

36. Not without some regret, we are accordingly driven to the conclusion that the landlord is entitled to recover its costs in full.

37. Contractual costs are awarded on an indemnity rather than a standard basis. Nevertheless, the amounts charged have to be reasonable. Looking at the schedule of costs dated 08 January 2021 in the sum of £13,578.24, we will reduce the number of hours spent by Mr Parkinson on letters out to his clients to 3 hours, the number of hours spent by him on letters to others to 3 hours, and we disallow the attendance of Ms Stanway at the hearing (representation was by counsel and she could have been at the other end of a mobile phone if required). This reduces the claim to £10,835.32.

32. Given that the tribunal has made a decision regarding the service charges, the landlord is entitled to a judgment in that sum. A separate County Court order, reflecting this decision is attached.

Name: Judge Brilliant: Date: 01 March 2021

Rights of appeal

Appeals in respect of decisions made by the FTT

A written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appeals in respect of decisions made by the Tribunal Judge in his/her capacity as a Judge of the County Court

An application for permission to appeal may be made to the Tribunal Judge who dealt with your case or to an appeal judge in the County Court.

Please note: you must in any event lodge your appeal notice within 21 days of the date of the decision against which you wish to appeal.

Further information can be found at the County Court offices (not the tribunal offices) or on-line.

Appeals in respect of decisions made by the Tribunal Judge in his/her capacity as a Judge of the County Court and in respect the decisions made by the FTT

You must follow **both** routes of appeal indicated above raising the FTT issues with the Tribunal Judge and County Court issues with either the Tribunal Judge or proceeding directly to the County Court.