

IN THE UPPER TRIBUNAL (LANDS CHAMBER)



**Neutral Citation Number: [2019] UKUT 257 (LC)
Case No: LRX/4/2019**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – PAYMENTS MADE IN ADVANCE

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

BETWEEN:

TRIPLEROSE LIMITED

Appellant

- and -

**HATICE CAKAN
SUAT BINKAYA**

Respondents

**Re: Flat 2,
708 Finchley Road,
London,
NW11 7ND**

Elizabeth Cooke, Upper Tribunal Judge

Determination on written representations

© CROWN COPYRIGHT 2019

Introduction

1. This is an appeal from a decision made by the First-tier Tribunal (“the FTT”) about the reasonableness and payability of service charges. The appellant is the respondents’ landlord, and issued proceedings against them in the county court in September 2017 non-payment of a sum that included service and administration charges; the claim was transferred to the FTT for it to determine whether those charges were reasonable and payable. The FTT made its determination without a hearing on the basis of written representations, having taken the view that that was appropriate and neither party having requested a hearing.
2. The total sum claimed in the county court proceedings was made up of ground rent (as to which the FTT has no jurisdiction), three payments demanded by way of the Interim Maintenance Charge required by the lease, some administration charges, legal fees and interest. The Interim Maintenance Charge is a service charge payable in advance on the basis of budgeted figures, and the FTT was shown the statements sent to the tenant breaking it down into items due for different services such as gardening, insurance and so on. Of the total sum claimed, the FTT decided that only the element of the service charges that related to insurance was reasonable and payable, as was a proportion of the administration charges.
3. This Tribunal has given the appellant permission to appeal in respect of the service charges claimed by the appellant, other than insurance, on the basis that the FTT appeared to have based its decision on the absence of evidence of actual expenditure, which would not be relevant to sums claimed in advance.
4. In the paragraphs that follow I set out and discuss the relevant provisions of the respondent’s lease, discuss the FTT’s decision, and then consider the appeal.

The relevant terms of the lease

5. The respondent holds a lease of Flat 2 at 708 Finchley Road, London NW11 7ND. It is dated 20 March 2002 and is for a term of 125 years from 25 March 2001. At paragraph 2 of Schedule 5 the tenant covenants to pay the Maintenance Charge, being the expenses incurred by the landlord in meeting its obligations in a later schedule. Despite its miserable absence of punctuation it is possible to understand from the rest of paragraph 2, together with the definitions set out earlier in the lease, that the arrangements for the payment of the Maintenance Charge are as follows:
 - a. The service charge year runs from 25 March.
 - b. As soon as possible after 25 March each year the amount of the Maintenance Charge for the past year is to be certified by the landlord’s managing agents or accountants.

- c. At the start of each service charge year – on 25 March or within 21 days of the landlord requiring payment – the tenant is to pay an Interim Maintenance Charge. This is defined as the sum to be paid on account of the Maintenance Charge that the landlord, or its managing agents or accountants, shall specify to be fair and reasonable. The payment to be made is to be increased by the amount, if any, by which the previous year’s Interim Maintenance Charge fell short of the actual Maintenance Charge. Conversely if there has been an overpayment then the tenant is to have that carried forward.
6. It follows that the tenant under this lease pays service charges in advance, and the amount of the advance payment does not depend upon the previous year’s charges except insofar as there was an under- or over-payment in which case an adjustment is made. But the amount actually claimed under the various heads does not have to match or to bear any particular relationship to what was spent the previous year.

The FTT’s decision and the appeal

7. I am going to explain the FTT’s decision and set out the matters that arise on this appeal alongside the relevant parts of the decision. As will be seen, the FTT’s decision suffers from some arithmetical problems and, since the matter will have to be remitted to the FTT, it is appropriate to set them out even where the parties have not raised them.

The amount in issue in the FTT

8. The appellant, which was the applicant in the FTT, filed a Statement of Case in the FTT which set out the amount that it claimed in the County Court as follows:

a)	Half yearly Service Charge	25 Mar 15 - 24 Sep 15	£263.51
b)	Half yearly Service Charge	25 Sep 15 - 24 Mar 16	£714.76
c)	Half yearly Ground Rent	29 Sep 15 – 28 Mar 16	£50.00
d)	Half yearly Service Charge	25 Mar 16 - 24 Sep 16	£714.76
e)	Half yearly Ground Rent	29 Mar 16 – 28 Sep 16	£50.00
f)	Half yearly Ground Rent	29 Sep 16 – 28 Mar 17	£50.00
g)	Half yearly Ground Rent	29 Mar 17 – 28 Mar 17	£50.00
h)	Administration fees (management) 2016		£444.00
i)	Administration fees (legal) 2017		£900
j)	Interest on Ground Rent to 19.9.17		£31.93
k)	Interest on Service Charges to 19.9.17		£408.71

9. That amounts to £3,677.67.

10. The FTT held a Case Management Conference and gave directions on 14 August 2018. It did not at that stage have the applicant's Statement of Case and instead worked from a statement of account dated 19 September 2017, which included all the sums set out above and a further sum of £205 for a court fee and therefore amounted to £3,882.67.
11. I believe that that court fee is the county court fee and therefore not relevant to what the FTT had to decide. However the FTT did not deduct it; instead it noted that the £3,882.67 included £200 ground rent, as indeed it did, and therefore said that that what was in dispute in the FTT was £3,662.87 (which is not quite right).
12. That figure should, I believe, have been £3,445.74, because what had to be deducted was the court fee, the ground rent, and the interest on the ground rent. Neither of the parties has submitted that the total figure the FTT thought it was considering was incorrect, but the problem is obvious on perusal of the figures.

The FTT's decision about service charges

13. At paragraph 2 of its directions, headed "Disclosure", the FTT directed the appellant to send to the respondent "copies of all relevant service charge accounts and estimates for sums claimed". At paragraph 8 it required that the bundle should contain copies of, among other things, "All relevant invoices in relation to the disputed costs", "all relevant accounts" and any other documents on which either party sought to rely.
14. By the time the FTT made its determination the respondent had not provided a statement of case, nor a witness statement. It was not known what concerns the respondent had about any of the items of which the service charge was made up.
15. The appellant had provided a statement of case and a witness statement and had also provided and placed in the bundle its "Statement of Anticipated Service Charge" for the two service charge years in question, namely 2015-2016 and 2016 – 2017.¹ The Statements of Anticipated Service Charge are itemised, showing the budgeted expenditure on gardening, cleaning, insurance etc. The budget is set out for the whole year and then divided by two to make two half-yearly Interim Maintenance Charges. Therefore as set out above, the total sum claimed by the appellant included three Interim Maintenance Charge payments, due on:
 - a. 25 March 2015 (£263.51),
 - b. 25 September 2015 (£714.76) and

¹ The FTT at its paragraph 8 referred only to the Statement for 2015-2016, but both statements were in the bundle. The FTT does not say that one is missing and I take it that it was aware of both.

c. 25 March 2016 (£714.76).

The instalment due on 25 March 2015 is shown on the Statement of Anticipated Service Charge to be £714.76 and I take it that the respondent had paid in part since only the £263.51 is claimed for that period.

16. The FTT noted at paragraph 9 that the appellant had failed to comply with its direction 8 which required “all relevant invoices” in relation to disputed costs to be included in the bundle, and “all relevant accounts”. The FTT does not say what invoices it thought were missing. It is the case, however, that the appellant had not provided the certified statement of the Maintenance Charge which the lease required to be provided at the end of each service charge year (see my paragraph 5b above).
17. The FTT considered the provisions of Schedule 8 of the lease and found that all the items set out in the Anticipated Service Charge statements were expenses of meeting the landlord’s obligations under Schedule 8. It then allowed the element of insurance because, it said, proof had been provided that those sums were incurred for insurance. But it disallowed the rest. It accepted that the appellant was entitled to claim sums in advance, but it said:

“ ... the sums claimed ought to have been certified sums, and the Tribunal has not been provided with any certified accounts as required by the lease. The Tribunal has also not been provided with any invoices. The only invoices/ ascertainable sums relate to the insurance payments. Accordingly the Tribunal cannot be satisfied on a balance of probabilities that sums were incurred for general maintenance, gardening or professional fees as claimed in the Applicant’s statement of claim”.
18. This is the point on which permission to appeal has been give. The appellant sought permission on a number of grounds, and it was granted on the basis that it was arguable that the FTT misdirected itself in basing its decision on a lack of evidence of actual expenditure, when what was claimed was an Interim Maintenance Charge payable in advance.
19. As I noted above the Maintenance Charge for the previous year is likely to generate a surplus or a shortfall which has the effect of adjusting the Interim Maintenance Charge. So the whole story cannot be seen without sight of the Maintenance Charge statement, certified as required by the lease. In giving permission to appeal the Deputy President directed the appellant to file and serve with its notice of appeal the annual maintenance certificates for the years ending 24 March 2014, 2015 and 2016, and the appellant has done so.
20. The respondent has made written representations in response to the appeal and has argued that the appellant’s failure to produce certified accounts justified the FTT’s conclusion. However, that is not the case. All that is needed for the Interim Maintenance Charge is a

budget, and the certified accounts for the previous year are relevant only if there is a need for an adjustment.

21. The respondent also argues that the accounts produced are not “certified” as required by the lease. They are certified by “Y & Y Management Ltd”, who would appear to be the landlord’s agent and therefore it would appear that the requirements of the lease are met. There is no requirement for independent certification.
22. Once the Tribunal’s directions for the submission of written representations by the parties had all been complied with, the respondent wrote to the Tribunal to ask that the matter be decided at a hearing, on the basis that the appellant has been allowed to submit new evidence in the form of service charge accounts and had also referred to case law that the respondent wished to answer. I have decided not to adjourn the matter to a hearing. The certified Maintenance Charge accounts have been provided by way of compliance with the FTT’s and this Tribunal’s direction but they make no difference to the decision to set aside the FTT’s decision. Moreover, these proceedings relate to Interim Maintenance Charges payable in advance on account of the budget; they are not an opportunity for the respondent to challenge items of actual expenditure. The cases referred to by the appellant have likewise made no difference to my decision.
23. The appeal must be allowed on this point because the FTT’s reasoning, quoted in paragraph 17 above, was incorrect in two respects. First, the lease does not require the Interim Maintenance Charge statement to be “certified”. The Interim Maintenance Charge is the sum that the landlord or its agent shall specify. And since the Interim Maintenance Charge is an advance payment there is no need for, and indeed no possibility of, proof that the expenses set out in the statement were actually incurred. So the FTT appears to have misdirected itself in disallowing all but the insurance payments for this reason.
24. The FTT made no mention of the sum claimed for interest on service charges.

The decision about the insurance payments

25. The insurance payments that the appellant was claiming were £517.70 being the budgeted figure for 2015-2016 and half that figure for 2016-2017 since in these proceedings only the first half of the Interim Charge, payable on 25 March 2016, is claimed for that year. So of the total amount in issue in the FTT the sum that related to insurance was £776.55 plus, presumably, a proportionate part of the interest on unpaid service charges. However, at its paragraph 14 the FTT said that it was satisfied that the service charges in respect of insurance in the sums

- a. £513.20 (2014/15)

b. £399.59 (2015/16) and

c. £412.79 for 2016

were payable, making a total of £1325.58. Those amounts must have been taken from the invoices the FTT saw. But that was not what the appellant was claiming, nor indeed what it was entitled to if all that was being allowed was the budgeted sums for insurance. Again, neither of the parties has raised this point but it is important that it be set straight on a re-hearing.

The administration charge

26. The final element in the FTT's decision related to the administration charge, made up (see paragraph 8 above) of £444 and £900. After some discussion about part payment at paragraph 16, at its paragraph 17 the FTT said "as the Applicant was not able to satisfy the Tribunal on a balance of probabilities that all of the anticipated expenditure was incurred, the Tribunal has applied a proportionate approach to this cost and has determined that no more than the sum of £600 is payable."
27. Accordingly altogether the FTT allowed £1,325.58 + £600.
28. In giving permission the Deputy President also observed that the administration charge appears to have been reduced by the FTT in the same proportion that the service charge was reduced, and that if the service charge was found to have been wrongly rejected then the administration charge might also need to be adjusted. That would indeed appear to be the case and in view of what I have decided about the service charges the decision about the administration charges must also be set aside.

Disposal

29. The appeal therefore succeeds, because the FTT misdirected itself about the service charges that it disallowed, and its decision about administration charges is therefore also unsustainable.
30. It is not possible for the Tribunal to substitute its own decision about the service charges, because it would need to hear argument about the effect upon the Interim Maintenance Charges of the certified Maintenance Accounts (both years appear to have generated a small credit balance), and also because it appears from the FTT's paragraph 16 that some evidence was given in relation to administration charges, and it is not possible from the information available to the Tribunal to understand what has happened in that regard. Accordingly the matter is remitted to the FTT for re-hearing; I hope that on the re-hearing it

will be possible for the FTT to have in mind my observations about the calculation of the total sum in issue and about the insurance charges.

Dated 16 August 2019

A handwritten signature in black ink, appearing to read 'Elizabeth Cooke', written in a cursive style.

Elizabeth Cooke

Upper Tribunal Judge