

12298



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

Case Reference : CAM/00KA/LSC/2017/0032

County Court Claim No : C3QZ64AK

Property : Flat 8, Faith House, 7 Napier Road, Luton LU1 1RF

Applicant : Cyril Freedman Limited

Representative : Chris de Beneducci (col), instructed by Spalter Fisher LLP

Respondent : Mr Muaazh Hamzah WASIL

Representative : Mr Arhum Wasil (brother)

Type of Application : for determination of reasonableness and payability of advance service charges [LTA 85, s,27A]

Tribunal Members : G K Sinclair, M Wilcox BSc MRICS & N Miller

Date and venue of Hearing : Wednesday 19th July 2017, at Aubrey Park Hotel, Redbourn, Herts

Date of decision : 3rd August 2017

DECISION

- Summary paras 1–4
- Relevant lease provisions paras 5–9
- Material statutory provisions paras 10–11
- Inspection and hearing. paras 12–21
- Discussion and findings paras 22–27

Summary

1. These proceedings began by a County Court money claim seeking £3 973.77 in respect of arrears of service charges and administration charges alleged to be payable under the terms of a lease dated 30th November 1990. The defendant lessee inserted a handwritten defence on the forms served with the claim. He alleged that he was transferred the property approximately a year before with no outstanding charges, nor was he made aware of these charges could accumulate to this extent. He noted that one window of flat eight had been painted, and that some other minor repairs such as to potholes have been carried out but that the charge was “extremely high and not affordable for such a little work and a studio flat”.
2. By order dated 14th February 2017 the court transferred the case to the First-tier Tribunal and on 28th March 2017 the tribunal issued directions. These required the claimant to file and serve a statement in response to the defence setting out its justification in principle and in law for the disputed service charge demands made and any administration fee claimed. In response the defendant/respondent was to file and serve a statement explaining, in respect of each claim for service charges and/or administration charges, whether they were being challenged and if so why. If it were admitted that ground rent is due then the respondent was asked to explain why it had not been paid.
3. The respondent did not comply with the tribunal’s directions and at the hearing his brother attended in his stead, claiming that as the respondent was a doctor it was far more important that he save lives than attend the hearing. The tribunal was not impressed by the respondent’s attitude. His brother’s ability to answer questions was limited but, where helpful to the tribunal, hardly exculpatory.
4. For the reasons set out below the tribunal determines that the three demands for payment of advance service charge totalling £1 550.45 are payable, as is the major works charge of £1 734.20, making a total amount due and payable of £3 284.65. The administration charges levied by the managing agents may be in accord with the managing agents’ office procedures but no provision is made for them in the lease and they are not allowable. Liability for ground rent, court issue fees etc. are matters for the court to determine. Interest has not been claimed.

Relevant lease provisions

5. The sample lease is dated 31st May 1990. Due to the fact that a page containing some critical provisions was found to be missing on the only available copy of the lease for this flat the sample provided (which may bear a different date to that in question) is the lease in respect of flat 7. It has two parties and is made between PTM Developments Ltd as lessor (1) and Margaret Dorothy Jeanette Moore as lessee (2). It is for a term of ninety-nine years from 1st January 1990 at an initial ground rent of £50, rising after thirty-three years to £100 and for the final thirty-three years to £150. The lessee’s covenants appear in the Fourth Schedule, the

lessor's in the Sixth, and both parties covenant with each other that they will observe and perform the covenants and obligations set out in the Fifth Schedule, the latter concerning annual maintenance charges (service charges).

6. Clause 6 provides that the lessor may forfeit the lease if the rent or any part thereof shall be in arrear and unpaid for twenty-one days after the same shall become due or if the lessee shall at any time fail or neglect to perform and observe any of its covenants. By way of additional remedy, paragraph 5 of the Fifth Schedule provides that if any sum required to be paid by the lessee is not paid within twenty-one days then it should carry interest at the rate of 4% over Barclays Bank plc base rate for the time being or the rate of 12% per annum (whichever rate should be the higher) until payment.
7. The Fifth Schedule identifies the "Annual Maintenance Costs" as meaning the total of all sums actually spent or incurred by the lessor in any year in the performance of its covenants contained in the Sixth Schedule and, without prejudice to the generality of the above, various items set out under paragraph 1(b). These include legal and other professional costs in connection with the management and/or maintenance of the building and in or in connection with enforcing performance and observance by the lessee and all other lessees of flats of the building of their choice to obligations and liabilities.
8. At paragraph 1(d) the Lessee's Share is defined as 1/9 of the Annual Maintenance Costs or such smaller proportion as may be payable by the lessee resulting from the lessor providing the services specified in the Sixth Schedule to any flat constructed by the lessor or its successors on land adjoining the building. The Lessee's Share is payable by means of two advance payments each year, on 1st January and 1st July, each of one half of the lessee's share of the preceding year's costs.
9. By paragraph 4, as soon as practical after 1st January in each year the lessee or its managing agents must serve upon the lessee a statement giving full particulars of the annual maintenance costs and certify the amount payable as the lessee's share in the preceding year. Upon receipt the lessee must then pay to the lessor the amount (if any) by which the lessee's share exceeds the advance payment made in respect of the year in question. If the advance payment exceeds the amount certified then the balance may, at the option of the lessor, be applied in or towards payment of the lessee's share for the next ensuing year.

Material statutory provisions

10. The tribunal's powers to determine whether an amount by way of service charge is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.
11. Insofar as major works are concerned, ie those in respect of which the contribution of any tenant liable to pay towards the service charge will exceed

£250, then section 20 provides that the relevant contributions of tenants are limited to that amount unless the consultation requirements have been either complied with in relation to the works or dispensed with by (or on appeal from) a leasehold valuation tribunal. The consultation requirements, in the instant case, are those appearing in Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003¹ (as amended).

Inspection and hearing

12. The tribunal inspected the exterior of the building at 10:00 on the morning of the hearing. Also present were representatives of the applicant's managing agents and their counsel. There was no appearance by or on behalf of the respondent.
13. From the street the house numbering appears confusing, with two number sevens visible. The tribunal was alerted, by the reference in service charge certificates appearing at page 45 in the bundle onwards to the fact that the respondent was being charged 7.6920% of the total maintenance costs, to the fact that there must by now be more than nine flats in the building – despite what appears in the lease plan. What has happened is that the building next door has also been converted into flats, with the result that the numbering – which starts next door and then continues in the subject building – goes from 1 to 14 (with 13 omitted). This was confirmed both by Ms Ignace's statement and by the tribunal entering each building and checking the numbers on the doors of each visible flat, including the lower ground floor flat in the adjoining building, which is accessible directly from the street.
14. The subject building in the lease appears rather more modern than that on its left when viewed from the street, being built over a passage at the far right-hand side which gives vehicular access to a large rear car park serving both buildings. From the rear both buildings are of modern or modernised appearance, perhaps because wooden windows have been installed in recent years, including an oriel window at second floor level in the adjoining building. From the car park the tribunal was able to observe that these (in both buildings) had all recently been stained – including two dormer windows in the rear slope of the roof.
15. Apart from the external decoration, which would have involved a considerable amount of scaffolding, the only other works identified were some minor repairs to the car park surface, including filling in small potholes.
16. At the hearing the tribunal had before it a relatively modest file of documents but was surprised to discover that, although the respondent failed to attend, two of his brothers turned up; one wishing to represent him and the other merely there as an observer. Neither had any written authority from their brother but the tribunal was prepared to hear what Mr Arhum Wasil had to say. On the other side Mr de Beneducci (counsel), Ms Ignace (the property manager – who had also provided a short witness statement) and Ms Chawda (credit controller) were in attendance. For some reason the applicant had brought along Mr Nigel Amos, an insurance broker, and sought to introduce a witness statement by him concerning the placement of buildings insurance by or on behalf of the applicant. As a question of insurance had not been raised by anyone and the time for filing and

¹ SI 2003/1987

service of witness statements had long gone the tribunal declined to admit his evidence.

17. The tribunal was directed to the advance service charge demands which had been served upon the respondent, complete with the required summaries of tenants' rights. Although the final accounts had been certified by the date of the hearing the application concerned the reasonableness and payability of the sums levied in advance in accordance with the lease. It did not concern the final or balancing payment so – in line with recent authority² – the tribunal confined itself, despite a request to do otherwise, to determining the reasonableness of the advance payments.
18. So far as the charge for major works is concerned the applicant had followed the required consultation procedure under section 20 before serving a demand for the respondent's share of the major works; the relevant correspondence being found at Annex E to the applicant's statement of case, from page 56 onwards.
19. However, while all the invoices save for the first had been correctly addressed and complied with sections 47 and 48 of the Landlord and Tenant Act 1987, some contained an item identified as "Administration Charge". The tribunal quizzed Mr de Beneducci about these, and where in the lease provision was made for this. He referred variously to paragraph 17 of the Fourth Schedule (which concerns costs incurred by the lessor for the purposes of or incidental to the preparation and service of a section 146 notice), paragraph 1(b)(iv) of the Fifth Schedule (which is a service charge cost rather than an administration charge payable specifically by the defaulting lessee), and finally fell back on paragraph 2 of the Fourth Schedule (viz the obligation to pay all rates taxes assessments charges, etc.)
20. Invited to explain why no payment had been made, even of ground rent, since his brother acquired the property in about July 2015, Mr Wasil was unable to provide a satisfactory answer. He confirmed that the lease of the property had previously been held by their father, and that the address on the invoice dated 5th June 2015 was their father's. Despite this, he claimed that the service charge certificates appearing at pages 45 to 47 had not been received, as they were not in "our records". Asked whether his brother, the respondent, had received the tribunal's directions order, he could not comment. When followed up by the tribunal as to whether this was because he chose not to comment or because he simply did not know, he replied that he had no answer on that.
21. He stated that the property had been gifted to his brother when he was studying abroad, yet despite having no time for managing property he chose not to ask his father – the previous lessee – for help and advice. At the same time as he had no time to respond to demands from his landlord for payment of ground rent and service charges, however, he was well able to collect rent from his sub-tenants.

Discussion and findings

22. Despite filing a feeble – and misleading – defence to the County Court claim which implied that he had been assured on purchase that all outstanding debts had been settled by his assignor the truth was that this was an inter-family

² *Knapper v Francis* [2017] UKUT 3 (LC); [2017] L&TR 20

transaction. It took place in mid-2015 – not about a year previously, as suggested in the defence. Invoices sent at first to his father’s address (as June 2015 preceded by about a month the actual transfer) and then to the respondent’s stated address (which also turned out to be his brother Arhum’s home address) were simply ignored. The respondent was happy to collect rent but not pay for outgoings on the flat.

23. The tribunal is satisfied, having seen the service charge certificates of actual expenditure as well as the advance service charge demands, that the latter were reasonable and payable.
24. The same is true for the major works. The requirements of both the lease and section 20 have been complied with and, despite a mathematical error in one of consultation letters, the lowest tender was in fact accepted. From its inspection (albeit at ground level only) the tribunal is satisfied that the work undertaken is of reasonable quality.
25. Where the tribunal must disagree with the applicant, however, is on the question of administration charges imposed for late payment or (in this specific case) non-payment of invoices. The lease entitles the lessor to charge what, at current interest rates, is quite a punitive rate of 12% per annum on late payments. It has chosen not to do so as yet. Managing agents are often fond of imposing penalty charges, but unless the specific lease permits them to do so then such charges are legally irrecoverable. Mr de Beneducci’s valiant efforts to identify a charging provision came to nought. These charges are not recoverable.
26. In the applicant lessor’s statement of case an argument is advanced that legal costs are recoverable because they were incurred in connection with the service of a section 146 notice. The tribunal’s directions were quite clear. The applicant had to identify when a decision was taken to proceed with forfeiture. No proper answer was given. Although raised in the statement of case this was not an issue discussed at the hearing. The tribunal considers that, if forfeiture proceedings are to follow, this is a question best left to the judge dealing with such a claim in the County Court – not by the tribunal at this stage.
27. The tribunal so reports to the court, which – if it remains unpaid – has yet to deal with the non-payment of ground rent; an issue which as yet remains outwith the tribunal’s jurisdiction.

Dated 3rd August 2017

Graham Sinclair

Graham Sinclair
Tribunal Judge