

IN THE UPPER TRIBUNAL (LANDS CHAMBER)



**Neutral Citation Number: [2018] UKUT 22 (LC)
Case No: LRX/41/2017**

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – interest – legal costs – whether costs reasonable – whether costs incurred in contemplation of forfeiture – appeal allowed in part

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

BETWEEN:

ASSETHOLD LTD

Appellant

- and -

MOHAMMED BARBARY ABDELHADI

Respondent

**Re: Flat E,
2 Coomassie Road
London
W9 3BW**

Decision on Written Representations

P D McCrea FRICS

No cases are referred to in this Decision

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DECISION

Introduction

1. This short decision concerns a dispute between Assethold Ltd (“the applicant”) and one of its tenants, Mr Mohammed Barbary Abdelhadi (“the respondent”), in respect of costs said to be payable under a lease dated 18 May 1987 of Flat E, 2 Coomassie Road, London, W9 3BW. It is by way of a review of a decision of the First Tier Tribunal (Property) Chamber (“the FTT”) dated 15 January 2017 - the dispute having been transferred to the FTT following proceedings being issued in the Barnett County Court on 19 November 2014.

2. The claim issued in the county court was for £2,173.94, including rent, service charges and administration charges (comprising legal costs and interest) of £561.35. By the time the dispute reached the FTT, the total amount claimed had reduced to £1,473.59, of which the only element in dispute that fell within the FTT’s jurisdiction was the £561.35 of administration charges, which it disallowed.

3. The appeal was brought with the permission of the Tribunal, the FTT having declined to review its decision and refused permission to appeal on 16 March 2017. In an Order dated 23 May 2017, the Deputy President ordered a review of the decision of the FTT by written representations.

4. The respondent’s engagement with the Tribunal was limited to a letter dated 6 July 2017 in which he said that whilst he opposed the appeal on the basis that the FTT dealt with the dispute correctly, and whilst he did not admit liability for the legal costs, he was willing to pay £101 in goodwill to settle the dispute.

5. On 18 August 2017, the appellant made a further application for permission to rely upon additional material that was not provided to the FTT including an application for costs under the FTT’s Rule 13 which provided details of the respondent’s alleged misconduct. On 13 September 2017, the Deputy President refused the application, but allowed consideration of the facts stated in the application to the extent that they would have been known to the FTT when it made its decision.

The FTT’s decision and refusal of permission to appeal

6. In its decision, The FTT summarised the relevant evidence and submissions as follows:

“11. The Applicant set out its case in its statement of case dated 5 October 2016. Proceedings were originally commenced in November 2014 seeking judgement in respect of ground rent of £100, service charges of £1473.59 and

administration charges of £561.35. Judgement in default was subsequently entered and a section 146 notice served. On 26 January 2015 payment was made by the Respondent in the sum of £2289.04. The Respondent's lender subsequently paid the sum of £830 in respect of the section 146 costs on 13 February 2016.

12. The tribunal was not provided with any invoices in relation to the administration charges of £561.35. However it was informed by Mrs Gurvits [the appellant's representative] that this sum was made up of legal costs in the sum of £510 and interest in the various amounts of £16.07, £2.31 and £10.08. We were further informed that these costs related to solicitors' costs incurred prior to the issue of proceedings on 4 November 2014 (the proceedings having been issued on 14 November 2014). Mrs Gurvits explained that the [appellant] had entered into a fixed fee arrangement with its solicitors in relation to legal costs prior to the issue of proceedings. We had no information which set out what these costs covered. However it appeared to represent perusal of the account and a letter before action to the leaseholder.

...

14. ... [The] Respondent [disputed] the legal costs as he said there had been defective service of the proceedings and thus he should not be liable for those costs. The tribunal heard that the judgment in the County Court had been set aside as it had been found in the County Court that service had been defective. Such service included not only the letter before action but the proceedings themselves. Counsel [for the respondent] submitted that we were bound by the County Court's decision on defective service.

15. If the tribunal found that the costs were recoverable in principle, [counsel for the respondent] confirmed the costs were also challenged on the basis of reasonableness. As far as the reasonableness of the legal costs was concerned [he] submitted that the [appellant] was not entitled to claim interest unless the costs were assessed at an assessment hearing. Interest could not be claimed as part of quantum. As far as the quantum of the costs themselves was concerned the tribunal heard that the Respondent had not received any letters or details as to how the costs had been calculated. It was also pointed out that in the claim form the amount claimed for solicitor's costs was stated to be £0.00. Counsel conceded that the [appellant] could potentially claim legal costs in principle but that these should have been properly demanded and itemised separately.

16. In response Mrs Gurvits submitted that the costs did not concern the judgement and represented legal costs which were incurred prior to the issue of the proceedings. It was her case that they then became part of the service charge.

17. As far as the section 146 notice was concerned the only action taken was confirmed by Mrs Gurvits to be a letter before action and then the proceedings themselves. The tribunal asked [her] to identify the evidence which showed the costs had been incurred in contemplation of forfeiture. The period in which these costs was concerned was confirmed by Mrs Gurvits to be 6 October 2014 to 14 November 2014. [She] confirmed that there was a letter sent during that period

which had mentioned possible forfeiture. The tribunal was referred to this letter dated 6 October 2014.”

7. As far as the element over which the FTT had jurisdiction, it concluded:

“21. The only sum in dispute before us was the sum of £561.35 which was confirmed to represent legal costs and interest. We disallow these costs. We had no evidence at all in relation to these costs save for the oral evidence given by [the appellant’s representative]. We would have expected to see a copy of the relevant invoice together with a breakdown to confirm what these costs represent. Further we were not satisfied that these costs were recoverable under the lease. It was accepted for the [appellant] that the only costs provision in the lease was a section 146 provision. Given that these costs had been incurred prior to the issue of proceedings we were not satisfied that they had been incurred in contemplation of forfeiture. Although the [appellant] had relied on a letter to the respondent dated 6 October 2014 to evidence the contemplation of forfeiture we were of the view that this letter was a generic letter referring to the powers of a freeholder generally and did not evidence any real intention to forfeit. Likewise we were not referred to any clause within the lease which allowed the landlord to claim interest on arrears.

22. We would also comment that even if we had found the costs to be recoverable in principle, in any event we would have found them to be unreasonable in amount. As far as we were able to ascertain these related only to the [perusal] of the account and a letter before action. They therefore appeared to us to be excessive and we would have allowed in the region of £100 plus Vat.”

8. As regards an application under s.20C of the Landlord and Tenant Act 1985, the FTT found:

“24. In the statement of case and at the hearing, the Respondent applied for an order under section 20C of the 1985 Act. He did so on the basis that the application should not have been necessary given the amounts paid both by himself and his mortgagor. It was pointed out that although he had conceded the service charge elements only today had he been provided with the relevant information earlier, matters could have been resolved. In response [the appellant] submitted that the sums had only been paid after the service of the section 146 notice. Having heard the submissions from the parties and taking into account the determinations above, the tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that [the appellant] may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.”

9. The application for permission to appeal included a copy of the two-page document with attachments that was handed up at the FTT hearing. As regards the sum in dispute, it said this:

“4(b) £561.35 Administration charge relates to costs incurred by the Applicant arising from the Respondent’s breach of the lease in failing to make payment of the service charge. £510.00 relates to fees of a solicitor and the remainder is interest. Enclosed is a copy letter from the solicitors confirming the fixed fee being £510.00 (marked 3). The Applicant has engaged a solicitor on a fixed fee basis given the sums involved and to avoid issues of costs becoming disproportionate to service charge management. The work for which the fee is charged includes works undertaken prior to the issue of the claim, in obtaining instructions and pre action correspondence and in preparation and issue of the claim itself. The Fee earner involved is a grade A fee earner and has significant years of experience in this field.”

10. The document “marked 3” was a copy of a letter dated 4 November 2014 from Greenwood and Co solicitors to the respondent, which referred to outstanding service charges of £1,473.59, and that “as a consequence of your default your landlord has incurred professional fees of £510.00 inclusive of fees to date. You are also liable for interest being £16.07 to date and accruing at the rate of at (sic) £0.46 per day”.

11. In its refusal of permission to appeal, the FTT acknowledged that it had a two-page submission in relation to the proceedings generally, which included submissions in relation to the legal costs of £550.58 (presumably an error as this amount was an undisputed service charge balance – it was £561.35 of legal fees and interest that was in issue), and had taken these into account, but had not seen a copy of the invoice or any form of narrative from the solicitors rather than from the applicant.

Grounds of appeal

12. The appeal is on the following grounds.

13. The applicant says that it had insufficient opportunity to address all the issues stated by the FTT owing to the respondent’s breach of directions which resulted in documents relating to the legal costs incurred only being handed up by the applicant at the hearing. The FTT did not acknowledge or refer to these documents, in its decision. In its refusal of permission to appeal, the FTT referred to the two-page submissions but not the attachments, which included correspondence from the solicitor detailing the charges.

14. In arriving at its conclusion that the intention to proceed to forfeiture was not genuine, the FTT did not refer to the fact that a s.146 notice had actually been served on the respondent. The FTT questioned the evidence of intention to forfeit, and the applicant produced a letter reflecting notice. The lease refers to the contemplation of the landlord, but no question was asked of the applicant as to its actual intentions or contemplation.

15. As regards the application under s.20, there were additional matters which the FTT failed to take into account: that the payment by the respondent's mortgage company was only made after the issue of county court proceedings and the service of a s.146 notice; that the application arose because the matter was referred from the county court after an order was made setting aside the judgment in the absence of the applicant; that the application to set aside the judgment and the court transfer took place after the payment to the applicant of sums which were not in dispute at the hearing; that as the service charges were eventually paid in full it had been reasonable for the applicant to issue proceedings; the efforts of the applicant to settle the county court proceedings would, if accepted by the respondent, have avoided the present proceedings in their entirety; the only success of the respondent was in relation to the administration charge – which was only raised three days before the hearing, by which time there had been two pre-trial reviews and submissions by the applicants for which costs had been incurred; that all matters fell away at the start of the hearing save for the issue of the administration charge

16. In granting permission to appeal, the Deputy President observed:

“2. The FTT made no reference in its decision to the documents relied on by the applicant which evidenced an agreement for the payment of a fixed fee of £510 including VAT for pre-action legal services, and gave no reason for treating the oral evidence of Mrs Gurvits as insufficiently probative that the agreed cost had been incurred. It is arguable for the reasons given by the applicant in its application that the FTT overlooked relevant evidence and that its decision was against the weight of that evidence. The FTT did, however, consider in the alternative what a reasonable charge would have been for the work undertaken and indicated that the sum would have been around £100 plus VAT. It may be that that a sum of that order is the best outcome the applicant can expect if the appeal is successful.

3. It is not clear from paragraph 24 of its decision that the FTT took into account the extent to which the service charges in dispute in the county court had been conceded by the respondent on the day of the hearing before it, or the fact that the issue over the administration charge on which the respondent was successful had emerged only a few days before the hearing. In any event, the decision to make an order under section 20C was based in part on the FTT's determination that the applicant was not entitled to the administration charge in dispute. If that determination was flawed it will be necessary for the order under section 20C to be reconsidered.”

Discussion and conclusions

Interest

17. I can deal very briefly with the claim for interest of £51.35. The FTT disallowed this element of the claim since it had not been referred to any clause in the lease that allowed the

landlord to claim interest on arrears. The application for permission to appeal does not state any basis on which this was wrong, and I therefore dismiss this element of the appeal.

Legal costs

18. As regards the entitlement of the landlord to reclaim the legal costs of £510.00, the FTT stated two reasons for dismissing the claim.

19. First, that it had seen “no evidence at all in relation to these costs save for the oral evidence of Mrs Gurvits. We would have expected to see a copy of the relevant invoice together with a breakdown to confirm what these costs represent.” Secondly, the FTT was not satisfied the costs were recoverable under the lease, since it had not been shown that they were incurred in contemplation of forfeiture (that costs incurred in contemplation would have been recoverable appears to be undisputed).

20. The suggestion that there was “no evidence at all” is not quite right. There was some (albeit limited) evidence before the FTT – it had the letter of 4 November 2014 from the landlord’s solicitors to the respondent which indicated that legal fees had been incurred of £510 inclusive of VAT “to date”. It also had the agent’s letter of 6 October 2014. As the FTT acknowledged, it also had the evidence of Mrs Gurvits. The FTT gave no reason for doubting Mrs Gurvits’ evidence that the costs had been incurred. Had it doubted the truthfulness of her evidence it should have put its concerns to her and made a specific finding with proper reasons.

21. The FTT did not consider that the letter dated 6 October 2014 was evidence that forfeiture was contemplated, but was merely a generic letter referring to the powers of the landlord generally.

22. In its refusal of permission, the FTT noted that it:

“did ask if the Applicant had any evidence that costs were incurred in contemplation of forfeiture for the period 6 October 2014 and 14 November 2014. In answer the tribunal was informed that there is a letter which “*includes notification of possible forfeiture*”. After looking through the papers this was identified as the letter of 6 October 2014. The Applicant’s representative was given every opportunity to comment on this issue. The tribunal’s decision was made on the evidence before it. Given the tribunal would be considering the payability of the administration charges the Applicant should have been fully prepared to deal with all relevant arguments.”

23. The letter dated 6 October 2014 was not included in the hearing bundle submitted to the Tribunal, but following my request it was filed with the Tribunal on 8 January 2018. It was a letter to the respondent from the applicant’s managing agent, headed “Notice of Proceedings”. It noted the respondent’s failure to make payment of his outstanding account; it explained that when the tenant was in default, the freeholder had a right to forfeit the lease and take possession of the flat, and said that ‘you have left us no choice but to apply to the court for “possession judgement” on your flat’.

24. The letter went on:

‘Your lease also entitles us to recover all of our costs in relation to these proceedings. Our initial costs for arranging the file for solicitors is detailed below. It should be noted that these are just initial costs.

Previous amount due	£1573.59
Our costs	<u>£ 90.00</u>
Total due	£1,663.59

Should you wish to avoid these proceedings please send us your immediate payment. Should you have any financial difficulties please contact us to try and make arrangements. Non-reply with result in the proceedings with no further reminder or warning. This offer is open to you until 13th October 2014.’

25. In my view, that letter clearly signalled the freeholder’s intentions, rather than, as the FTT interpreted it, simply a generic warning letter which did not evidence any intention to forfeit. It referred specifically to the rights to forfeit and warned of court proceedings for a “possession judgement”. Whilst it did not detail the expected legal costs, it did indicate that the sum of £90 was initial costs, and that the file was being prepared for solicitors. The respondent would have been left in little doubt that further costs would be incurred, and the solicitor’s letter of 5 November would not have come as a surprise.

26. I accept that it would have been preferable for the FTT to have seen an invoice from the solicitor detailing the charges and work undertaken but on balance I am satisfied that there is sufficient material to show that the work had been carried out. In my view the amount claimed for this work is not unreasonable, and it did fall within the provisions of the lease as regards contemplation of forfeiture. The FTT did not refer to the fact that the charge had been agreed as a fixed fee for the proceedings. It was reasonable for the appellant to incur costs on that basis, and that there was no reason to regard the charge itself as unreasonable for such an arrangement. On further consideration, the Deputy President’s suggestion that £100.00 might be the limit of the respondent’s liability does not seem to me to be correct. Accordingly, I allow the appeal on this element and determine that the respondent is liable to pay the sum of £510.00 to the appellant

27. The result of the appellant’s success on that element is that the FTT’s order under s20C must be reconsidered.

Order under s20C

28. Section 20C of the Landlord and Tenant Act 1985 provides:

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before... the Upper Tribunal... are not to be regarded as relevant costs to be taken into account in

determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

...

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

29. I accept the grounds of appeal outlined in paragraph [15]. As identified by the Deputy President in granting permission to appeal, the FTT does not seem to have considered the lateness of the resolution of many of the issues, and it was plainly reasonable for the appellant to have pursued the claim. There was no other means by which it could recover the sum to which it was contractually entitled. If the appellant is entitled under the terms of the lease to add the costs of the proceedings before the FTT to the service charge, there is no basis on which it would be just and equitable to prevent it from doing so. This part of the appeal is also allowed, and the FTT's order under section 20C is set aside.

Dated: 19 January 2018



P D McCrea FRICS

Addendum on Costs

30. The appellant requests an Order under Rule 10(14) of the Tribunal's procedure rules directing that the respondent reimburses the fees incurred by the appellant of £770.00, comprising the application fee of £220.00, the appeal fee of £275.00, and the determination fee of £275.00.

31. I directed that the respondent be given 28 days to respond, but no response was received.

32. As far as relevant, rule 10 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (as amended) provides:

“Orders for costs

10. (1) The Tribunal may make an order for costs on an application or on its own initiative.

(2) Any order under paragraph (1)—

(a) may only be made in accordance with the conditions or in the circumstances referred to in paragraphs (3) to (6);

(3) The Tribunal may in any proceedings make an order for costs—

...

(c) in the circumstances to which paragraph (14) refers.

...

(14) The Tribunal may order a party to pay to another party costs of an amount equal to the whole or part of any fee paid (which has not been remitted by the Lord Chancellor under the Upper Tribunal (Lands Chamber) Fees Order 2009) in the proceedings by that other party that is not otherwise included in an award of costs.”

33. I am satisfied that the respondent should reimburse the claimant for the fees incurred. As I indicated in paragraph 29, it was reasonable for the appellant to pursue the claim to recover sums to which it was contractually entitled. It is equally reasonable for it to recover the fees incurred in doing so.

34. I direct that the respondent shall pay the claimant the sum of £770.00 within 28 days.

Dated: 1 May 2018



P D McCrea FRICS