

UPPER TRIBUNAL (LANDS CHAMBER)



UT Neutral citation number: [2020] UKUT 331 (LC)
UTLC Case Number: LRX/35/2020

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – building managed by superior landlord – intermediate landlord claiming recovery of charges paid to superior landlord for services provided in two annual accounting periods – whether recoverable from occupational leaseholder as balancing charge for one annual accounting period – appeal allowed

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

BETWEEN:

NETWORK HOMES LIMITED

Appellant

and

MR DAN BLESSING

Respondent

Re: Flat 6,
2 Boleyn Road,
London,
N16 8EP

Martin Rodger QC, Deputy Chamber President
18 November 2020
Hearing conducted by Skype

Justin Bates, instructed by Network Homes Ltd, for the appellant
The respondent, Mr Blessing, in person.

Introduction

1. This appeal raises a short point of construction of the service charge provisions of a shared ownership lease.
2. By a decision issued on 20 February 2020 the First-tier Tribunal (Property Chamber) (FTT) determined that the respondent, Mr Dan Blessing, was not liable to pay to his landlord, Network Homes Limited, a sum of £1,599.40 as a balancing charge for the service charge year ending on 31 March 2018 under his lease of Flat 6, 2 Boleyn Road, London N16. With the permission of this Tribunal, Network Homes now appeals against that decision.
3. The issue of Mr Blessing's liability to pay the balancing charge had been brought before the FTT by Mr Blessing himself on an application under section 27A Landlord and Tenant Act 1985. Throughout these proceedings his case has been that he has paid all of the sums which he is liable to pay.
4. The hearing of the appeal was conducted using a remote digital platform. Mr Bates appeared for the appellant and Mr Blessing represented himself. I am grateful to them both for their submissions.
5. In order to understand the FTT's reasons for its decision it is necessary to refer to the terms of a headlease granted by Taylor Wimpey UK Ltd to Network Homes on 8 December 2016, and then to the terms of the lease which Network Homes granted to Mr Blessing on 20 December 2016.

The headlease

6. Network Homes holds headleases of a number of flats at 2 Boleyn Road. The parties to each of the headleases were Taylor Wimpey as Landlord, Network Homes as Tenant, and a company named Remus Management Ltd which was referred to as the Management Company. As that description implies, the usual services were to be supplied to the building by the Management Company and the Fifth Schedule to the headlease comprises covenants by it to repair, insure and maintain the building.
7. By clause 1(a) of the Third Schedule Network Homes covenanted to pay a Maintenance Charge and various other charges. The "Maintenance Charge" was to be a specified proportion of "the sums spent or to be spent by the Management Company on the matters specified in the Fifth Schedule and in Part II of the Sixth Schedule as estimated or adjusted in accordance with Part I of the Sixth Schedule".
8. The Sixth Schedule is headed "covenants by the Management Company and the Tenant in respect of the Maintenance Charge" and is in three parts. Part I is concerned with payment and accounting. Part II identifies the various heads of expenditure to be recovered by means of the Maintenance Charge. Part III specifies the proportion of the Maintenance Charge payable for the flat as 4.06%.

9. Paragraph 1 of Part I of the Sixth Schedule is headed “Estimate” and provides:

“The Management Company shall as soon as practicable after the 1st day of January in each year prepare estimates of the sums to be spent by it on the matters specified in Part II of this Schedule (“Estimated Management Costs”) for such year and shall forthwith thereafter notify the Tenant of such Estimated Management Costs”

10. By paragraph 2 of the Sixth Schedule the Tenant is required to pay the Maintenance Charge to the Management Company within 21 days of receipt of demand. Although paragraph 2 refers to the sum to be paid as the Maintenance Charge, whereas paragraph 1 refers to the sum to be estimated as the Estimated Management Costs, it is clear enough that these expressions are intended to be synonymous.
11. Paragraph 3 of the Sixth Schedule is headed “Account and Adjustment” and requires the Management Company to keep accounts in respect of each calendar year of the sums spent by it on the matters specified in Part II of the Sixth Schedule and the obligations in the Fifth Schedule, which are referred to as “Actual Management Costs”. As soon as reasonably practicable after the end of the calendar year it is to notify the Tenant of those actual costs and an adjustment is then to be made to the Estimated Management Costs for the current year.
12. The headlease is not a well drafted document but the basic structure of the payment obligations is not seriously in doubt. Three features are of significance for this appeal: first, that the accounting period under the headlease is the calendar year; secondly, that the costs for the whole year (the Maintenance Charge or the Estimated Management Costs) are to be estimated after 1st January for the same year; and, finally, that Network Homes is required to pay that estimate for the whole year within 21 days of receiving a demand.

The shared ownership lease

13. Mr Blessing is the leaseholder under a shared ownership lease (“the Lease”) granted to him by Network Homes on 20 December 2016. He has a 40% share of the leasehold interest for a term of 125 years less 5 days.
14. Clause 7 of the Lease makes provision for the payment of service charges. “Service Charge” is defined in Schedule 9 and means the sum of four separate items: the Maintenance Charge payable by Network Homes under the headlease; a heating charge; a charge relating to costs incurred by Network Homes under the headlease in relation to the maintenance of service installations; the “Service Provision”. By clause 7.1 the leaseholder covenants to pay the Service Charge during the Term by equal monthly payments in advance on the first day of each month with the first payment to be made on the date of grant of the lease.
15. By clause 7.2 the draftsman introduces a new term, the “Service Provision” which forms part of the Service Charge but is separately provided for by clauses 7.3, 7.4 and 7.5. Clause 7.2 is headed “when calculated” and requires the Service Provision for any Account Year

to be calculated before the beginning of the Account Year in accordance with clause 7.3. The expression “Account Year” is defined as a year ending on 31 March.

16. Clause 7.3 is headed “how calculated” and explains the Service Provision as follows:

“The Service Provision shall consist of a sum comprising the expenditure estimated by the Authorised Person as likely to be incurred in the Account Year by the Landlord for the matters specified in clause 7.4 together with [a reserve]”

17. The matters specified in clause 7.4 include compliance by Network Homes with its obligations under the headlease.

18. Clause 7.5 is headed “adjustment to actual expenditure” and provides:

“As soon as practicable after the end of each Account Year the Landlord shall determine and certify the amount by which the estimate referred to in clause 7.3 (*how calculated*) shall have exceeded or fallen short of the actual expenditure in the Account Year and shall supply the Leaseholder with a copy of the certificate and the Leaseholder shall be allowed or (as the case may be) shall pay immediately following receipt of the certificate the excess or the deficiency.”

The reference in clause 7.3 to “the Authorised Person” is a reference to an individual to be nominated by Network Homes to provide the estimate of expenditure in accordance with clause 7.3. The FTT found that that person was the Management Company.

The facts

19. Mr Blessing purchased the Lease on 21 December 2016, just before the end of the calendar year accounting period used for the Estimated Management Costs under the headlease, but more than three months before the end of the Account Year for the Lease itself.
20. The rent payable under the Lease was £7,177.50 a year and the monthly Service Charge contribution which Mr Blessing was required to pay under clause 7.1 was £135.50.
21. It is common ground that, although the Lease required Mr Blessing to pay the first monthly instalment of the Service Charge on the date on which the Lease was granted, administrative delays on the part of Network Homes meant that it was not prepared to accept any payment from him until July 2017. A schedule prepared by Network Homes suggests that payments made by Mr Blessing in July 2017 totalled £3,231.94. For his part Mr Blessing told me that he has paid a sum sufficient to meet rent and Service Charge instalments for each month from January 2017 to March 2018.
22. It is not in doubt that by August 2017 Mr Blessing was making regular monthly payments of £733.63 comprising his monthly rent and Service Charge instalment. Network Homes

acknowledges that during the accounting period from 1 April 2017 to 31 March 2018 Mr Blessing paid twelve instalments of £135.50 totalling £1,626.

23. The Management Company did not demand Estimated Management Costs or Maintenance Charges under the headlease from Network Homes during Network Homes' first Account Year ending on 31 March 2017. For its part, having incurred no charges, Network Homes did not prepare end of year accounts or a certificate under clause 7.5 nor did it ask Mr Blessing to make any balancing payment for that Account Year. This may be the source of uncertainty over whether Mr Blessing later paid for the three months from January to March 2017. In its correspondence Network Homes has suggested that it has never charged for that period, but Mr Blessing is confident that he did pay for the whole period from the start of his Lease.
24. On 18 July 2017 Network Homes received three demands from the Management Company under the headlease. They were for:
 - (a) £11.25 for building insurance from 29 November 2016 to 31 December 2016;
 - (b) £47.89 described as an interim service charge from 20 December 2016 to 31 December 2016; and
 - (c) £1,580.97 described as an interim service charge and estimated gas charge for 1 January 2017 to 31 December 2017.
25. Network Homes paid all three invoices on 7 September 2017.
26. On 28 November 2017 Network Homes received a further invoice from the Management Company demanding £1,547.79 as an interim service charge and estimated heating charge for the period 1 January 2018 to 31 December 2018, payable on 1 January 2018. At some time after that date and before 31 March 2018, Network Homes paid the sum demanded.
27. Network Homes had therefore paid service charges demanded of it by the Management Company in respect of three calendar year accounting periods under the headlease, 2016, 2017 and 2018. All of those payments were in respect estimated charges and all were paid during Network Homes' own Account Year ending on 31 March 2018. The period covered by those charges ran from 20 December 2016 to 31 December 2018.
28. On 13 December 2018 Network Homes issued its Service Charge certificate for the period 21 December 2016 to 31 March 2018. The certificate recorded that the estimated charge for 2017/18 had been £1,626 and the actual cost incurred was £3,225.40. Of that sum, £3,180.40 comprised the four invoices received from the Management Company. The difference between the estimated charge and the actual charge was £1,599.40 and Network Homes asked for the payment within 28 days.

The application to the FTT and its decision

29. In his application to the FTT Mr Blessing made it clear that he was not disputing the reasonableness of any costs incurred by Network Homes. He suggested nevertheless that it was not reasonable for him to be expected to pay two years of service charge in one year. He also asserted that he had paid 24 monthly instalments of service charge contributions totally £3,252 in the period from January 2017 to December 2018 and that there should therefore be no amounts owing by him to Network Homes for that period as the aggregate of the Management Company's estimated charges for those two years was £3,128.76.
30. In Paragraph 16 of its decision the FTT made a finding that Mr Blessing had not been provided with estimated service charges for the correct Account Year by the Management Company or by Network Homes. It went on:

“The tribunal finds that [Network Homes] has accepted the calendar year estimates provided to it by [the Management Company] without making any recalculation in respect of the differing Account Year provided for by Mr Blessing's lease.”

31. It is clear from this passage that the FTT considered Network Homes was required to apportion the 2018 Estimated Maintenance Charge which it had paid to the Management Company and to claim from Mr Blessing only that part of the charge which related to its own Account Year ending on 31 March 2018.
32. In paragraph 20 the FTT explained why it considered the disputed sum was not payable by Mr Blessing:

“The tribunal finds that this sum of £1,599.40 is not due from or payable by the applicant as it represents the payment of service charges for a period for which Mr Blessing has not been provided with a proper estimate of service charges in accordance with his lease; which do not represent “actual” charges incurred by the respondent and which do not represent any shortfall between any “actual” charges and (incorrect) estimated service charges identified by the respondent landlord but have arisen to the respondent's use of the incorrect accounting (calendar) period when demanding payment from Mr Blessing.”

33. The FTT went on in paragraph 21 to regret that Network Homes had contributed to the confusion over the service charges payable by Mr Blessing “by failing to adjust the estimated service charges it receives from [the management company] for a calendar year to properly reflect Mr Blessing's service charge period”. Mr Blessing was only liable to pay for any shortfall in his Service Charge after the Account Year had ended and in accordance with clause 7.5 of his lease. The FTT concluded:

“The interim demands for payment made by the respondent are not in accordance with the lease and Mr Blessing is not liable to pay the sums demanded.”

The appeal

34. Mr Bates submitted that the FTT had misunderstood the charges claimed by Network Homes and had mistakenly treated them as if they were demands for estimated charges whereas in fact they were demands under clause 7.5 of the Lease for balancing charges for the 2017/18 Account Year. The Account Year runs from 1 April to 31 March. During the 2017/18 Account Year Mr Blessing was due to pay and did pay 12 monthly instalments of Service Charge in accordance with clause 7.1 of the Lease, totalling £1,626. During that financial year Network Homes was required to pay, and did pay, the four invoices raised by the Management Company. The only apportionment of those invoices which was required was to exclude the small sum of insurance referable to the period of a few weeks before the grant of the Lease. The remainder of the invoices was attributable to the period from 21 December 2016 to 31 March 2018 and totalled £3,225.40. Network Homes had issued a certificate under clause 7.5 certifying that figure and specifying the balance due from Mr Blessing as £1,599.40. That sum was due under clause 7.5 as the balancing charge for the Account Year ending 31 March 2018.
35. In his submissions Mr Blessing did not challenge Network Homes' interpretation of the Lease. If the Tribunal concluded that Network Homes was entitled to recover two years service charges which it had paid to the Management Company in only one of its own account years, then he would not quarrel with that conclusion. Mr Blessing's point was that he had paid each monthly instalment from January 2017 to December 2018 which totalled more than the £3,252 actual expenditure referred to in the Network Homes certificate (which included the Management Company's charges for the whole of 2018) and that his payments had not been properly accounted for by Network Homes.
36. The FTT primary reason for concluding that the disputed sum was not due from Mr Blessing was that he had not been provided with a proper estimate of service charges in accordance with his lease. I do not accept that analysis. The sum demanded by Network Homes was not an estimate at all. It was the balancing charge calculated by deducting the payments made by Mr Blessing from the total charges incurred by Network Homes during the 2017/18 Account Year. The fact that those sums included the Estimated Management Costs payable by Network Homes under the headlease for the 2018 calendar year did not make the balancing charge an estimate or require that it be collected from Mr Blessing only by monthly instalments.
37. Contrary to the FTT's view, Network Homes is not required by the Lease to apportion the charges it has incurred during the account year so as to differentiate between charges paid in respect of the account year itself and charges paid in respect of some future period. The relationship between the payment provisions of the Lease and those of the headlease is poorly designed and is liable to result in large sums becoming payable in advance despite the Lease seeking to avoid unexpected fluctuations. Under the headlease, the Estimated Management Cost for the calendar year is payable by a lump sum in advance which falls due three months before the end of the Lease's Account Year. That lump sum will always be recoverable from the leaseholder by means of the balancing charge in the Lease. The obvious intention of the Lease itself is that the Service Charge should be paid in equal monthly instalments with only a balancing charge due at the end of the year, but in practice the leaseholder is required to pay up to nine months' in advance.

38. The lack of attention given by the drafter of the Lease to the operation of the service charge provisions and their relationship to the headlease does not change their meaning. In my judgment Network Homes was clearly entitled to include the sums it paid on account for 2017 and 2018 when calculating the balancing charge payable under the Lease for its 2017/18 Account Year.
39. Mr Blessing did not seek to uphold the FTT's interpretation of the service charge provisions of the Lease. He believes he has paid all of the sums demanded of him on account for the 24-month period covered by the Management Company's estimated charges and that Network Homes have failed to take all of his payments into account when calculating the suggested shortfall. The FTT sympathised with that proposition but it did not undertake a proper accounting exercise to determine what service charges were payable, how much had been paid, and what if any surplus or deficit remained. The material provided for the appeal does not enable me to carry out that exercise and it is regrettably necessary for me to remit the matter to the FTT for it to consider those questions.

Disposal

40. For the reasons I have given I allow the appeal and remit the application under section 27A, 1985 Act for a determination of Mr Blessing's liability to pay the disputed sum to the FTT for further consideration. If at all possible, the parties should seek to agree a schedule of what was due and what was paid and to identify the payments which are in issue. If they are unable to reach a complete agreement within six weeks of this decision Mr Blessing should apply to the FTT for directions for reconsideration of his original section 27A application.
41. Mr Bates explained that the appellant had brought the appeal because the FTT's decision raised issues about the meaning and effect of the Lease which would apply to many other leases in the same form. Mr Bates said that Network Homes was happy to submit to orders under section 20C, 1985 Act and under paragraph 5A of Schedule 11, Commonhold and Leasehold Reform Act 2002 to ensure that none of the costs of these proceedings would be recoverable from Mr Blessing. I am happy to make an order in those terms.
42. The FTT directed that Network Homes should reimburse the application fee and hearing fee paid by Mr Blessing and although I set aside the remainder of its decision, there was no request for me to reverse that direction and I leave it undisturbed.

Martin Rodger QC
Deputy Chamber President
26 November 2020